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STATE OF ILLINOIS

APPELLATE COURT

34 I.A. 28

AT AN APPELLATE COURT, for the ^{Third}~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE BURTON A. ROETH, _____ Presiding Judge

HONORABLE C. ROSS REYNOLDS, _____ Judge

HONORABLE WILLIAM M. CARROLL, _____ Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the _____ 19th day
of _____ February _____ A. D. 19⁶², there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:



RECEIVED SEP 26 1967

FILED

7319 1962

Robert L. Conn, CLERK
APPELLATE COURT, 3RD DIST.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10345

Agenda No. 1

Wilma Lee Seaquist,

Plaintiff-Appellant,

vs.

Charles E. Alexander, Jr.,

Defendant-Appellee.

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Appeal from the
Circuit Court of
DeWitt County

ROETH, PRESIDING JUSTICE

Plaintiff appeals from a judgment entered on a not guilty verdict of a jury in a suit under the Dram Shop Act. Plaintiff was a passenger in an automobile which struck a culvert. The suit is predicated upon the claim that the driver of the automobile was intoxicated as a result of liquor sold by defendant.

The principal ground for reversal asserted by counsel for plaintiff is that the verdict is contrary to the manifest weight of the evidence. In considering this assignment of error we are required to examine the evidence. In so doing we are cognizant of the well settled rule which guides us, namely: a

court of review cannot hold the jury's verdict to be against the manifest weight of the evidence unless an opposite conclusion is clearly evident.

At the outset, it appears from an examination of the brief of counsel for defendant, that it is not contended that Kline Baker, the driver of the car in which plaintiff was riding, was not intoxicated. The defense in this case is predicated on the theory that the plaintiff was a willing participant in producing the intoxication of Kline Baker, the driver.

The testimony produced on behalf of the plaintiff most favorable to her reveals that plaintiff lived in a one room apartment in Chicago. On the morning of April 16, 1958, Kline Baker with another man came to her apartment. She had known Kline Baker for a year and had imbibed with him on prior occasions thinking he was a divorced man. She was just getting up and was in her sleeping attire and a robe. They asked for some water which she furnished. She then proceeded to get dressed. As the trio started to leave the apartment, plaintiff noticed a bottle on a table. The plaintiff went to a restaurant and the two men to a tavern. After having coffee, plaintiff joined the two men in the tavern. There plaintiff had some beer with Kline Baker's companion. The trio left the tavern together en route

to Warrensburg, Illinois, with Kline Baker driving. After about two hours of driving they stopped for gas and all left the car for various purposes. When they arrived at Warrensburg they went to the home of Kline Baker's companion where plaintiff met the wife of Kline Baker's companion. The companion of Kline Baker went to bed and a new trio, namely Kline Baker, the plaintiff and the wife of Kline Baker's companion, proceeded at 9:30 P.M. to defendant's tavern. They remained in the tavern until after midnight. During this time Kline Baker was drinking and plaintiff admits she had some "sips" of beer. On cross examination she admitted she might have had four short beers. Upon leaving the tavern plaintiff was aware of the fact that Kline Baker had had too much to drink and after she got in the car she was of the opinion that he was intoxicated. Plaintiff testified that during the time the trio was in defendant's tavern she repeatedly asked Kline Baker to take her back to Chicago all to no avail, that she didn't have any money and didn't know anyone there.

Testimony which defendant relies upon reveals that Kline Baker and his male companion arrived at plaintiff's apartment in Chicago at about 10:00 P.M. on April 15. The trio went to a tavern in the neighborhood and had some drinks. They then returned to plaintiff's apartment about 2:00 A.M. on April 16

and drank whiskey. The two men stayed all night. The trio awoke at 6:00 A.M. and proceeded back to the neighborhood tavern and each had two or three bottles of beer. In the afternoon they left for Warrensburg. En route plaintiff purchased, at one stop, a pint of whiskey from which the trio drank in the car. At another point they stopped for a beer apiece and a six pack and plaintiff drank one can from the six pack. At defendant's tavern in the evening plaintiff drank four small bottles of beer paid for by Kline Baker.

Counsel for the parties both contend that the foregoing testimony presented a question of fact for the jury and we pass upon the principal ground for reversal in the light of these contentions. Obviously the question of whether plaintiff was a willing participant in the drinking and in producing the intoxication of Kline Baker was a fact question for the jury and we cannot say that a conclusion other than that arrived at by the jury is clearly evident.

Counsel for plaintiff further contends that error was committed in giving defendant's instruction number 5 which is as follows:

"The court instructs the jury that if it should find from the evidence that the plaintiff, Wilma Seaquist, materially participated in drinking with the alleged intoxicant, Kline Baker, such material

participation by the plaintiff would exonerate the defendant, Charles Alexander, under the terms of the Illinois Dram Shop Act, and you should return your verdict finding said defendant not guilty."

The principal point urged is that the instruction omits the use of the word "voluntarily" in referring to the participation. We have carefully examined the abstract and find no reference to this objection being made at the conference on the instructions. Consequently this objection cannot be considered on this review. Thompson v. Chicago & Eastern Illinois Railroad Co., 32 Ill. App. 2d 397 , 178 N.E. 2d 151, and cases therein cited. Aside from this, we cannot perceive how the jury could have been misled by this omission since the voluntary character of plaintiff's actions in participating in the drinking are for the most part not disputed. We have examined all instructions given and those refused and conclude that the jury was fairly instructed.

Counsel for plaintiff also urges that reversible error was committed by the trial court in refusing to permit greater latitude in the cross examination of the witness Carl Binkley. Certain questions were asked of this witness on cross examination to which objections were sustained. No offer of proof was made by counsel for plaintiff and we are of the opinion that consequently nothing is preserved for review. Balstad v. Solem Machine Co., 26 Ill. App. 2d 419, 168 N.E. 2d 732; Rench v. Bevard, 29 Ill.



App. 2d 174, 173 N.E. 2d 1.

We find no reversible error in this case and accordingly the judgment of the Circuit Court of DeWitt County will be affirmed.

Affirmed.

REYNOLDS and CARROLL, JJ., concur.



STATE OF ILLINOIS

APPELLATE COURT

Third

34 I.A. 29

AT AN APPELLATE COURT, for the ~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE BURTON A. ROETH, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE WILLIAM M. CARROLL, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 19th day
of February A. D. 19⁶², there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:

1880-1881

1882-1883

1884-1885

1886-1887

1888-1889

1890-1891

1892-1893

1894-1895

1896-1897

1898-1899

1900-1901

1902-1903

1904-1905

1906-1907

FILED

SEP 19 1962

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10379

Agenda No. 11

| | | |
|-----------------------|---|------------------|
| Nancy Anne Mansfield, |) | |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| vs. |) | Appeal from the |
| |) | Circuit Court of |
| Darrell L. Mansfield, |) | Greene County |
| |) | |
| Defendant-Appellant. |) | |

CARROLL, J.

Plaintiff, Nancy Anne Mansfield, brought suit for divorce against the defendant, Darrell L. Mansfield, on the ground of adultery. The Court heard the cause without a jury and entered a decree dissolving the bonds of matrimony theretofore existing between the parties and making certain provisions with reference to alimony and the support and custody of the minor child of the parties. Defendant has appealed.

In her verified complaint, plaintiff alleges that the parties were married on August 25, 1956; that one child was born of the marriage; that defendant has been guilty of adultery with a woman well known to plaintiff; that the said woman became



pregnant with child by defendant; that plaintiff first learned of said adultery and pregnancy on or about June 11, 1960; that immediately thereafter plaintiff ceased to live with defendant; and that the parties have not lived together as husband and wife since said date. The remainder of the complaint allegations pertain to custody, support and property rights, which are not involved in this appeal.

In his answer the defendant denied being guilty of adultery as charged in the complaint and also denied the allegation that he and his wife had not lived together since June 11, 1960.

The single question presented is whether the evidence in the record justified the trial Court's finding that defendant was guilty of committing adultery.

The defendant was called as a witness under Section 60 of the Civil Practice Act and testified that plaintiff and he separated some time in June, 1960; that he thought it was June 9; that he and plaintiff had difficulties for several months; that in the early part of June he told plaintiff there was a letter which she should know about; that he told her where this letter was; that it had been given to him in the business district of Whitehall; that he did not remember who gave it to him or whether the giver was a man or woman; that it was signed Marianne; that he remembered part of the contents of the letter; that he remembered that "This Marianne said she thought she might be pregnant"; that

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his wife read the letter; that he then threw it in the wastebasket; that he had made inquiry concerning a divorce in Mexico; that he was interested in a divorce because he and his wife were not happy; that he recalled visiting Marianne Schmalz at her apartment during several months prior to June 11, 1960, but there were always other people present. When asked whether he knew Marianne Schmalz or visited her on the evening of June 11, 1960, the defendant claimed constitutional protection against self-incrimination and refused to answer.

The plaintiff testified that she and the defendant separated on June 21, 1960; that on June 11, 1960, her husband told her to read a letter which was in a dresser drawer in the home of the parties; that the letter was signed Marianne Schmalz; that it stated Marianne was leaving and moving to Jacksonville; that she would put the baby up for adoption; that if she never saw defendant again she wanted him to know she loved him very much; that after reading the letter she replaced it in the drawer and had not seen it again; that she did not live with defendant as his wife after June 11, although she remained in the home until June 21; that her husband had been away from home on many occasions; and that prior to reading the letter, she knew nothing of Marianne's pregnancy.

Arthur Schmalz, father of Marianne, testified that on June 11, 1960, she was 25 years old and was residing with him in



Jacksonville, Illinois; that on that date he knew she was pregnant; that she told him defendant would come to see them that evening; that defendant at that time told the witness he would like to marry Marianne; that defendant hoped they could be married quickly; that he thought he could get a quick divorce in Mexico. The witness further testified that defendant had been to see Marianne several times prior to his call on June 11.

Defendant contends that the trial court erred in refusing to dismiss the complaint for want of equity because there was no evidence in the record that he was the father of the child of Marianne Schmalz and no direct evidence of his ever having sexual relations with her. In view of the testimony of the parties and of Marianne's father, it seems apparent that defendant proceeds upon the theory that where a complaint charges adultery the Court is warranted in finding the defendant guilty only upon direct and positive proof of the adulterous acts alleged. Such theory is at variance with the rule applicable in determining the sufficiency of proof to establish the fact of adultery. It is true that the proof offered to sustain a charge of adultery must be sufficient to clearly convince the mind affirmatively that the carnal act was committed. Hoef v. Hoef, 323 Ill. 170. However, it is equally important to recognize that in such cases very seldom is there direct and positive evidence of the adulterous



acts charged. As the Supreme Court said in Zimmerman v. Zimmerman, 242 Ill. 552, where it quoted from Daily v. Daily, 64 Ill. 329, as follows:

"In all, or nearly all, such cases there is no direct and positive evidence of the acts charged. In such cases the parties generally use every effort to conceal the act, and courts and juries are compelled to determine the question from the behavior of the parties and from a great variety of circumstances, either of which, when considered alone, would be insufficient to prove the charge, but when considered together may be, and frequently are, amply sufficient to establish the offense. It, like all other charges, may be established by circumstantial evidence, and the evidence need only, when considered together, convince the mind that the charge is true."

To like effect is the statement of the Court in Marcy v. Marcy, 400 Ill. 152, where it is said:

"When the facts and circumstances introduced in evidence fairly and reasonably lead to the conclusion that adultery has been committed the court will be justified in finding the charge sustained. (Cooke v. Cooke, 152 Ill. 286; Daily v. Daily, 64 Ill. 329.) As this court stated in the case of Bast v. Bast, 82 Ill. 584, 'The fact of adultery is to be inferred from circumstances that naturally lead to it by a fair inference as necessary conclusion. The direct fact of adultery can seldom, or ever, be proved.'"

If there was some reasonably innocent explanation for the conduct of the defendant in showing his wife the letter informing him of Marianne's pregnancy, in visiting Marianne at her apartment, in making inquiry concerning a Mexican divorce, in telling Arthur Schmalz that he would like to marry his daughter, whom



he knew to be pregnant, it is not disclosed by this record. From our examination of the evidence, we are satisfied that it was ample to sustain the charge of adultery.

There is no merit in defendant's argument that the acts of adultery, if committed, were condoned by the plaintiff. The defendant in his answer, while denying the allegations that the parties had not lived together after June 11, 1960, did not mention condonation of the acts of adultery. Condonation is an affirmative defense and will be considered only when specially pleaded. McGaughy v. McGaughy, 410 Ill. 596. It may be further added that if such defense were available to defendant, then the burden of proof was on him to establish it by a preponderance of the evidence. Schiff v. Schiff, 25 Ill. App. 2d, 157. He offered no evidence bearing on the question of condonation.

It is further contended by defendant that he was deprived of his constitutional rights to be present during the whole trial because the trial judge heard the testimony of Arthur Schmalz in chambers. The record shows that prior to the witness being called to the stand, a discussion took place between the judge and counsel for both parties. Following such discussion the Court announced the witness would be heard in chambers, after which the Court heard the witness's testimony in his chambers. The defendant made no objection to such procedure and his counsel was present when the witness testified and cross-examined him. Although defendant states that he was excluded



from the chambers while Schmalz was testifying, the record affords no foundation for such an assertion. Contrary to defendant's contention, the record shows that the Court announced to the parties in open court that the witness would be heard in chambers. The failure of defendant to avail himself of the privilege of being present when the witness testified is unexplained. Because he did not see fit to be personally present when the witness testified does not warrant the conclusion that he was barred from so doing. In the absence of any showing to the contrary, we must conclude that defendant's right to be present during the whole trial was not abridged by any action of the trial court.

For the reasons stated we are of the opinion that the judgment of the Circuit Court of Greene County should be affirmed.

Affirmed

ROETH, P.J., and REYNOLDS, J., concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT., SECOND DIVISION
OCTOBER TERM, A.D. 1961

34 I.A.2 46

PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. PHILIP ENGLISH, HAROLD)
C. MAHONEY, and PETER SCHMIDT,)

Petitioners-Appellants,)

vs.)

JACK E. BOWERS, State's Attorney)
of DuPage County; LAWRENCE)
HATTENDORF, Recorder of Deeds of)
DuPage County; CHARLES J. SCHATZ,)
Milton Township Supervisor;)
HAROLD P. DUNTON, WESLEY E. KIDD)
and BURTON TILDEN, Milton Town-)
ship Assistant Supervisors;)
EMMETT S. JULIUS, Commissioner of)
Highways, Milton Township;)
CLARENCE C. SCHMOLDT and CHESTER)
L. JAMES, Enforcing Agents of)
DuPage County Subdivision Regu-)
lations; O. B. Dold, DuPage)
County Superintendent of High-)
ways; CLARENCE C. SCHMOLDT,)
Chairman of the County Board of)
Supervisors of DuPage County,)

Defendants-Appellees.)

Appeal from the
Circuit Court of
DuPage County.

WRIGHT -- J.

Petitioners instituted an action in the Circuit Court of

DuPage County, Illinois, for a writ of mandamus against certain public officials of said county to compel enforcement of a subdivision ordinance. On motion of the defendants, the Circuit Court entered an order striking the petition and dismissing the action with prejudice. From this order, petitioners appeal.

The sole question presented on this appeal is the sufficiency of the petition to state a cause of action for a writ of mandamus.

Briefly the petition alleges that the petitioners are land and property owners situated in Milton Township, County of DuPage, part of a subdivision designated as Arthur T. McIntosh and Co., Valley View Unit No. 2, recorded in the Recorder's Office of DuPage County, Illinois, on February 25, 1957; that the Board of Supervisors of DuPage County on November 20, 1956, adopted and approved certain Subdivision Regulations, a copy of which is attached to the petition, marked Petitioners' Exhibit No. 1 and made a part thereof, and that said regulations are still in force and existence; that said Subdivision Regulations set forth standards to be observed in the development of the subdivision with reference to sewerage, drainage, construction of streets, width of streets, surfacing of streets, construction of curbs, gutters and sidewalks, and numerous other standards not herein specifically

cited.

That the Arthur T. McIntosh and Co., a corporation, as subdivider comes within the purview of said Subdivision Regulations having filed its final plat with the necessary and proper officials of DuPage County on February 19, 1957, which was approved on that date by the DuPage County Zoning Committee, Milton Township Highway Commissioner, the County Superintendent of Highways, the County Surveyor and the County Health Department; that said plat was approved and accepted by the Board of Supervisors and recorded on February 25, 1957, and comes within the purview and provisions of the Subdivision Regulations, which became effective prior thereto, to-wit, on November 20, 1956.

That the said Arthur T. McIntosh and Co., a corporation, through its officers and agents, refuse and still refuses to observe the mandatory provisions of the said Subdivision Regulations as described here; that said company has initiated plans to finish the construction of the drainage system, streets, curbs, sidewalks and other phases of the construction and improvements in an incomplete and unfinished manner; that unless said streets, curbs, sidewalks and other improvements are completed as provided in the Subdivision Regulations, your petitioners, together with others, present and future, to the number of approximately 350 will suffer monetary loss

together with the loss of improvements required under the Subdivision Regulations; that the defendant officials of DuPage County knew or should know of the continued refusal of Arthur T. McIntosh and Co., to observe the requirements of said regulations, and have not in the light of said refusal instituted steps to require and order said company to comply with the provisions of said regulations and that it becomes the duty of the defendants to order the enforcement of the provisions.

Petitioners pray that a writ of mandamus may be issued directed to said defendants to enforce the provisions of the Subdivision Regulations, and that said defendants be directed to order the Arthur T. McIntosh and Co., a corporation, to comply with the provisions of said regulations relative to the subdivision described herein.

Defendants contend in their motion to strike the petition and to dismiss the cause that the petition is insufficient to state a cause of action for the following reasons: (1) That the duty on the part of the defendants as alleged in the petition is not specific in its nature and is not of such a character that the court can prescribe definite acts which would constitute performance of that duty. (2) That the petition improperly seeks to have the court control and regulate a general course of official conduct and enforce the

performance of official duties generally. (3) That the petition improperly seeks to have the court assume the management of official affairs of DuPage County and assume governmental functions which are vested in the legislative and executive departments.

Petitioners argue that the petition clearly states an exact duty, precisely defined in the terms of the Subdivision Regulations and states a breach of that duty and, therefore, clearly states a cause of action for writ of mandamus. Petitioners further argue that in considering the sufficiency of the petition, the trial court improperly considered affidavits attached to defendants' motion to strike.

Mandamus will not lie where to issue the writ will put in the hands of the court the control and regulation of the general course of official conduct as in the general enforcement of a statute or an ordinance. Board of Education of School District 85½ v. Idle Motors, 339 Ill. App. 359, 90 N. E. 2d 121; People ex rel. Bartlett v. Dunne, 219 Ill. 346, 76 N. E. 570. The law is well settled that a writ of mandamus will not be issued unless the petitioner shows a clear legal right to the writ. A party cannot be compelled to perform an act by mandamus unless it is made to appear affirmatively that it is his clear duty to do so. The party who seeks to compel the performance of an act must set forth every material fact

necessary to show that it is the plain duty of such party to act in the premises before the courts will interfere. *People v. Sellars*, 179 Ill. 170; *Daniels v. Cavner*, 404 Ill. 372.

A writ of Mandamus will only lie to compel the performance of a specific legal duty but will not lie where the issuance of the writ would amount to an attempt by the court to prescribe a general course of official conduct. *People ex rel. Irish v. Board of Education*, 6 Ill. App. 2d 402.

Mandamus lies only to compel the performance of some duty owing to an individual or to the public. The duty must be specific in its nature and of such character that the court can prescribe a definite act or series of acts, which will constitute a performance of the duty, so that the respondent may know what he is required to do and may do the act required and the court can enforce its performance and may know that the act has been performed. *People ex rel. Bartlett v. Dunne*, *supra*.

The many duties alleged in the petition here under review are not specific enough and of such a character that the court could prescribe definite acts to be done which would constitute performances of the duties.

If a writ of mandamus should issue in this case and an order be entered as prayed in the petition, the court would be required to assume the complete supervision of the development

of the subdivision in an effort to enforce its order, which would inevitably culminate in utter confusion.

We conclude that the allegations of the petition are insufficient to state a cause of action for a writ of mandamus and that the trial court properly dismissed the petition.

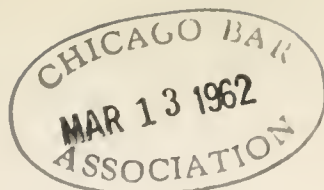
Petitioners further urge that the trial court improperly considered affidavits attached to defendants' motion to dismiss. We do not deem it necessary in passing upon the sufficiency of the petition herein to consider whether or not the trial court erred in considering these affidavits for the reason that we are of the opinion that the petition on its face is insufficient to state a cause of action for the issuance of a writ of mandamus. If we should remand the case with directions for the trial court to consider the motion to strike the petition, without considering the affidavits or directing that an answer be filed and a trial had on the merits, the case must end with dismissal of the petition as to the defendants herein. Board of Education of School District 85½ v. Idle Motors, supra,.

For the reasons herein stated, the order of the Circuit Court of DuPage County, Illinois, is affirmed.

A F F I R M E D.

SPIVEY, P. J. and CROW, J., Concur.

ABST.



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34 I.A. 2-6/6

| | | |
|-------------------------------|---|--------------------|
| WILLIAM J. BUTTERFIELD and |) | APPEAL FROM |
| STEPHANY A. BUTTERFIELD, |) | |
| |) | THE SUPERIOR COURT |
| Plaintiffs-Appellees, |) | |
| |) | OF COOK COUNTY |
| vs. |) | |
| |) | |
| SAMUEL CINMAN d/b/a S. CINMAN |) | |
| COMPANY, |) | |
| |) | |
| Defendant-Appellant. |) | |

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from the entry of a revival judgment in favor of William J. Butterfield and Stephany A. Butterfield, plaintiffs, and against Samuel Cinman, doing business as S. Cinman Company, defendant.

Defendant's main contention here is that the judgment which has been revived in the instant suit was barred by defendant's discharge in bankruptcy and is not within the exempt class enumerated in section 17 of the Bankruptcy Act. It is provided therein that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts,... except such as... (2) are liabilities for obtaining money or property by false pretenses or false representations, or for wilful and malicious injuries to the person and property of another...." 11 U.S.C.A §35(a) (1961).

Plaintiffs filed their original suit for rescission and cancellation of a contract with defendant on the ground of

fraud in the inducement, alleging that defendant had obtained \$4,000.00 from plaintiffs, pursuant to the contract, through deliberate misrepresentations which defendant knew to be false. Upon defendant's default in that suit the court entered judgment for plaintiffs, including at plaintiffs' request a special finding that "malice is the gist of the action" and a body execution. The court order, entered on April 30, 1953, read in part:

THEREFORE, it is ordered by this court that the contract entered into between the plaintiffs and defendant herein is fraudulent in law and is null and void.... It is further ordered that judgment be entered against the defendant and that defendant be ordered to pay plaintiffs herein the sum of \$4,000.00 plus interest at the rate of 5% from October 4, 1951 plus costs of this action.

Within the time allowed by statute defendant filed a petition to vacate the default judgment. In his petition he denied all the allegations of fraud, deceit and misrepresentation, denied that he was indebted to plaintiffs in the amount of \$4,000.00, and asked that his petition be considered as an answer to the plaintiffs' original complaint and the cause be set down for hearing. After a hearing on the petition the court entered a judgment order which read, in part, as follows:

It is hereby ordered, adjudged and decreed that the judgment heretofore entered herein on April 30, 1953, be and the same is vacated and held for naught.

It is further ordered that judgment be entered against the defendant, Samuel Cinman, d/b/a S. Cinman Co. and in favor of Plaintiffs herein, in the amount of Four Thousand and no/100 (\$4000.00) Dollars and costs.

We are presented with the question of the nature, or theory of liability, of the second judgment. Defendant asserts that it is an ordinary money judgment while plaintiffs contend that it is based upon fraud and misrepresentations as was the default judgment.

Since there are no special findings recited in the second judgment we are left to an examination of the record in order to place a construction upon that judgment order. It is well settled that an order or decree must be considered in the light of other parts of the record, the pleadings, the issues in the case, and former decrees concerning the same cause. (Aloe v. Lowe, 298 Ill. 404). This determination is thus necessarily a question of law for the court.

Upon the record we conclude that the second judgment was entered upon grounds of fraud and the obtaining of money under false representations. There was but one complaint filed by plaintiffs, and it was based unequivocally upon fraud and deceit in the inducement of a contract, asking for the return of \$4,000.00 which defendant had obtained under false pretenses. The second judgment, though general in form, must be deemed to have been based upon the allegations in the complaint. (Pemberton v. Ladue Realty and Construction Company, 180 S.W.2d 766, 771). We find nothing in the record which would justify our departing from this rule of construction in favor of a determination that

the second judgment for \$4,000.00 was entered on a theory of liability different from that asserted by plaintiffs, or from the first judgment.

The default judgment contained a body execution pursuant to a specific finding that "malice is the gist of the action." The second order recited neither of these. This deletion by itself, however, without additional and specific recitals in the order, does not indicate that the second judgment is different in its nature from the first. The problem here is equivalent to a case where a special malice finding and body execution were included in the judgment order, but were later removed from the same order. Under those circumstances it has been held that their removal does not extract with it the fraud and misrepresentation upon which the judgment was based. (See Dewes v. Grindle, 312 Ill. App. 180; LaCerra v. Woodrich, 321 Ill. App. 107). Being one for fraud and the obtaining of money under false pretenses, then, the second judgment was immune from the adjudication in bankruptcy by virtue of section 17(a).

Even if the nature of the judgment which has been revived were such as to render it dischargeable in bankruptcy, defendant would not be entitled to prevail under the circumstances of this case. Although defendant was served with an execution several years prior to the instigation of the present action he

did not attempt to obtain a discharge from the judgment. This unreasonable delay in prosecuting the defense of bankruptcy prevents defendant from now availing himself of it.

Contrary to defendant's belief, plaintiffs' motion for summary judgment need not be supported by affidavits.

Section 57(1) of ch. 110, Ill. Rev. Stat. (1961) provides:

For plaintiff. At any time the opposite party has appeared or after the time within which he is required to appear has expired, a plaintiff may move with or without supporting affidavits for a summary judgment or decree in his favor for all or any part of the relief sought.

Moreover, defendant failed to challenge the validity of the summary judgment on this ground below and can not do so for the first time on appeal. Smith v. Karasek, 313 Ill. App. 654.

We have considered the other contentions of defendant in arriving at our conclusion. For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

MURPHY, P.J., and ENGLISH, J., concur.

Abstract Only

Abstract

NO. 11552

Agenda 10

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A.D. 1961

34 I.A.2 66

MARIE HEATON, formerly Marie Brunett
Andrews,
Plaintiff-Appellant,
vs.
JOHN T. ANDREWS,
Defendant-Appellee.

Appeal from the
Circuit Court,
Lee County.

McNEAL, J. -

On October 16, 1959, Vera Marie Brunett and the defendant, John T. Andrews, executed a contract wherein he agreed to pay her \$65 per month beginning November 1, 1959, for the support and maintenance of Jacqueline Marie Andrews. Plaintiff sued defendant before a justice of the peace to recover payments due under the contract for the months of September, October and November, 1960, and recovered a judgment against him for \$195. On appeal from the justice, the Circuit Court of Lee County entered judgment for defendant, and plaintiff appealed.

On the trial de novo in the circuit court without a jury the evidence showed that prior to her association with defendant, plaintiff had been married to a man named Brunett. The Brunetts were divorced on March 24, 1953. Although plaintiff contemplated marriage with the defendant, they were never married. Plaintiff testified that they lived together both before and after the birth of their child; that defendant took plaintiff to Missouri where Jacqueline Marie was born on August 1, 1954; and that the child was given the name Andrews because defendant wanted her so named. Plaintiff and defendant continued to live together until October 16, 1959, the date they signed and sealed the contract involved on this appeal.

After reciting their desire to settle all disputes and differences which had arisen between them, the contract provides that John T. Andrews and Vera Marie Brunett mutually agreed as follows:

1. He agreed to pay her \$2500 on the date of the agreement and she acknowledged receipt of that sum.

2. In consideration of the payment of the \$2500 and other good and valuable consideration, she released and forever discharged him from any and all claims, demands, actions and causes of action arising from any act or occurrence up to that time, particularly, but not limited to, any action or cause of action under Chap. 17 Ill. Rev. Stat. 1955, Chap. 89 Ill. Rev. Stat. 1957, and a certain written agreement between the parties dated June 11, 1957.

3. As a further consideration for the execution of the agreement and release, he agreed to pay her \$65 per month beginning November 1, 1959, for the support and maintenance of Jacqueline Marie Andrews until she attains the age of 18 years or until she becomes self-supporting or is married prior to attaining 18 years of age, or is legally adopted.

4. She agreed to permit him to visit Jacqueline at reasonable times.

5. She agreed to vacate his premises in Dixon on or before October 17, 1959, without notice, and agreed to permanently remain away from such premises or any other premises where he might reside from time to time.

Defendant testified that he signed the contract in the presence of his attorney, Mr. Gunner, who told defendant that plaintiff would sue him "for the bastardy act" if he didn't sign the agreement. Plaintiff testified that she had a conversation with defendant with regard to his signing the contract or her starting suit against him, but that the conversation did not involve a suit under the Bastardy Act, and that when she signed the agreement she understood that she could not start an action against him if he signed the contract and paid the \$65 per

month. Plaintiff testified further that the written agreement dated June 11, 1957, mentioned in the contract, involved a lump sum payment of \$1000 to her for her own use; that she and James Heaton were married on September 10, 1960; and that defendant made no payments for the months of September, October and November, 1960.

In his memo-opinion the trial court noted that the trial had proceeded on the theory that Andrews had paid the \$65 per month as agreed, and at the time of the trial was three months in arrears and in default in the amount of \$195; and that although plaintiff contemplated marriage, the record was silent as to what the defendant contemplated, if anything. However, since plaintiff failed to proceed against defendant within two years as required by the Bastardy Act (Ch. 17 Ill. Rev. Stat. 1955), and since section 4 of the Paternity Act (Par. 54, Ch. 106 3/4 Ill. Rev. Stat. 1959) provides: "No such action may be brought after the expiration of two years from the birth of the child" unless the reputed father has acknowledged "in open court the paternity of the child", and since defendant at no time in open court ever acknowledged the paternity of Jacqueline Marie Andrews, the trial court concluded that there was no consideration for the contract and entered judgment for defendant.

Plaintiff moved the court to vacate the judgment and to enter judgment in her favor, or in the alternative to vacate the judgment and to grant her a rehearing. The post-trial motion was supported by plaintiff's affidavit that defendant promised to marry her prior to her divorce in March, 1953, and again in March, 1954, after he was divorced; that defendant lived with her as husband and wife at his residence in Dixon in April, 1954; that defendant then promised to marry her as soon as he could get away from his business and they could be married away from Dixon so that their acquaintances would not be aware that they were not married; that after the birth of their child in August, 1954,



defendant repeated his promises to marry her, and on June 14, 1959, promised to marry her in a few days; that on June 21 defendant stated for the first time that he wouldn't marry her; and that on September 18, 1959, she mailed defendant a notice that she was about to commence action for breach of promise or agreement to marry, as required by Sec. 28, Ch. 89, Ill. Rev. Stat. 1957. A copy of the notice was attached to the post trial motion as an exhibit. The trial court denied the post trial motion and plaintiff appealed from the court's ruling on the motion and from the judgment in favor of defendant.

Plaintiff's theory on appeal is that the contract was supported by valid consideration and that it should have been upheld by the trial court and enforced according to its terms. Defendant adopts the trial court's version of the case as his theory on appeal. Defendant also complains that the notice of plaintiff's intention to sue for breach of promise was not before the trial court until she filed her post trial motion, and that the evidence shows only that plaintiff mailed a notice of her intent to sue, and not that defendant received the notice. Defendant contends that he signed the contract because his attorney told him that plaintiff would sue him "for the bastardy act".

In his brief defendant's counsel concedes that plaintiff lived with defendant from 1953 to 1959, and that she gave birth to Jacqueline Marie Andrews on August 1, 1954, while the parties were living together but not married. Counsel contends that the last date plaintiff could have commenced an action against defendant under the Bastardy Act was August 1, 1956, or several days thereafter, crediting the out of State period at time of birth, and that by the second paragraph of their contract, "plaintiff agreed to give up something she didn't have, namely, a cause of action under the Bastardy Act." By the second paragraph of the agreement, plaintiff released and discharged defendant "from any and all claims, demands, actions and



causes of action arising from any act or occurrence up to the present time, particularly, but not limited to, any action or cause of action under Chap. 17, Ill. Rev. Stat. 1955, Chap. 89, Ill. Rev. Stat. 1957, and a certain written agreement between the parties dated June 11, 1957." While the reference to Chap. 17 of the statute may have pertained to an action under the Bastardy Act, plaintiff's release was not limited to an action under that act, and the reference to Chap. 89 clearly pertained to an action for breach of promise or agreement to marry.

The facts disclosed in plaintiff's post trial motion clearly indicated that an action for breach of promise was not barred by limitations. There is nothing in this record to indicate that defendant ever denied that he lived with plaintiff from 1953 to 1959, or that he promised to marry her on numerous occasions during that period, or that he received the notice required by Chap. 89 of the statute. The contract also recites that further consideration for the release of plaintiff's cause of action under Chap. 89 was defendant's promise to pay her \$65 per month for the support of Jacqueline. Further, it appears that defendant had furnished a home for plaintiff and her child in Dixon from 1954 until the execution of the agreement, and that in the contract she agreed to vacate defendant's premises on or before October 17, 1959, and to remain permanently away from such premises or any other premises where he might reside; and that part of the consideration for her execution of the agreement to vacate defendant's premises was his promise to pay her \$65 per month for the support of Jacqueline. Under these circumstances it is our opinion that either plaintiff's release of her cause of action for breach of promise or her execution of the agreement to vacate defendant's premises afforded adequate consideration for defendant's promise to pay \$65 per month for the support of their child. A contract is to be construed as a whole, giving meaning and effect to every provision, since it is presumed that everything in a contract was inserted deliberately and for a purpose. *Gay v. S. N. Nielson Co.*, 18 Ill. App. 2d 368, 376.



Defendant relies primarily on Heaps v. Dunham, 95 Ill. 583.

In that case Heaps sued to enjoin the sale and collection of his notes for \$1050, of which \$550 was in discharge of Lavinia Snell's prosecution for bastardy, and the balance of \$500 in settlement of her threatened prosecution for seduction. There was some doubt whether Lavinia was ever pregnant, and if she was it was claimed that she miscarried the day after the settlement was made. Nevertheless the Supreme Court held that Heaps was bound by his notes given in settlement of the charge of bastardy; but held that there was no consideration for the \$500 promised Lavinia for her alleged seduction. If any right of action for seduction existed, it was in favor of Lavinia's mother, since she alone was entitled to her daughter's services, the loss of which was the foundation for the action. Thus Lavinia had no legal right of action for seduction to settle, no doubtful claim therefor to compromise, and collection of the \$500 notes was enjoined. Since no claim for seduction is involved in the instant case, the decision in the Heaps case is distinguishable and affords no aid to defendant here.

Defendant also cites and quotes from Glidden v. Nelson, 15 Ill. App. 297, 299. In that case the plaintiff sued in assumpsit to recover for the care and support of her bastard child which she claimed was begotten by defendant out of wedlock. She recovered a judgment for \$600. On appeal defendant urged three points, but the court reversed the judgment on the third point only, stating:

"As to the third point, we find no evidence in the record to show that the defendant at any time made any express promise to pay for the care, nurture and expense attending the birth of the child, or for any other matter concerning the maintenance of it; nor is there any proof that the defendant ever adopted the child as his own, or that any proceedings in bastardy were ever had against defendant by plaintiff.

"We find * * * that unless the father voluntarily adopts



the child as his own, which he may do with the consent of the mother, he will not become liable for its necessary maintenance. That in other cases he is not liable except upon an express promise or an order of affiliation, this is the common law rule on the subject. But upon the strength of the natural or moral obligation arising out of the relation of the putative father to his child, an action at common law lies for its maintenance and support on an express promise."

In the instant case there was an express promise by the defendant to pay plaintiff \$65 per month for the support and maintenance of Jacqueline Marie Andrews. However, we are not required to determine whether or not defendant's moral obligation to support his illegitimate child was sufficient to support his express promise to furnish such support. As indicated above, there were other considerations recited in the contract executed by plaintiff and defendant which were adequate to support defendant's promise to pay the sum specified for the support and maintenance of their child.

We find that there was adequate consideration for the contract and that the trial court ought to have enforced the contract and entered judgment for the plaintiff. Accordingly the judgment of the Circuit Court of Lee County is reversed, and judgment that plaintiff have and recover of defendant \$195.00 and costs is entered here.

Reversed, and judgment here.

Dove, P. J., and Smith, J. Concur.

STATE OF ILLINOIS

APPELLATE COURT

THIRD

34 I.A.² 202

AT AN APPELLATE COURT, for the ~~Fourth~~ ^{Third} Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE BURTON A. ROETH, _____ Presiding Judge

HONORABLE C. ROSS REYNOLDS, _____ Judge

HONORABLE WILLIAM M. CARROLL, _____ Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 19th day
of FEBRUARY A. D. 1962, there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

FILED

7319 1962

Agenda No. 5

General No. 10369

Junior Lamar,

Plaintiff-Appellee,

vg.

Leo E. Toohey,

Defendant-Appellant.

Robert L. Conn, CLERK
DELLATA COURT, 3RD DIST.

Appeal from the
Circuit Court of
Menard County

CARROLL, J.

The plaintiff brought this action to recover damages for personal injuries sustained in an automobile collision. The court below entered its judgment upon a verdict in favor of the plaintiff in the sum of \$30,000. The defendant's post trial motion was overruled and this appeal follows:

The defendant urges as error: (1) alleged improper conduct of the court during the course of the trial, (2) that the verdict is the result of passion and prejudice, (3) that the plaintiff failed to sustain his burden of proof with respect to due care.

The plaintiff's complaint charges the defendant was negligent: (1) In operating his automobile on the wrong side of the road, (2) in failing to maintain proper control of his automobile, and (3) in failing to maintain a proper look-out.

The evidence is conflicting. The accident occurred on September 4, 1958, about 1 mile northwest of Petersburg in Menard County, Illinois, on Illinois Route 97. The collision occurred at a curve in the roadway at approximately 2:30 A. M. Illinois Route 97 is a paved highway and at the time of the collision the roadway apparently was dry and the weather was clear. The plaintiff was operating his automobile in a generally southerly direction and the defendant was approaching in the opposite lane. It appears from the plaintiff's testimony that the defendant edged over into the plaintiff's lane and that the plaintiff attempted to turn his automobile to the right off the roadway immediately prior to the collision. The plaintiff seemed to be uncertain as to whether his automobile was on the paved portion of the highway or on the shoulder at the time of the collision and accounts for this uncertainty because the defendant allegedly did not dim his lights immediately prior to the collision. The defendant denied that he crossed over the center line and testified that the plaintiff crossed over into the northbound lane of traffic and struck the automobile of the defendant. The defendant also testified that the plaintiff's automobile did not have head lamps operating at the time of the collision. The plaintiff testified that he had no trouble with his lights and that they were operating. It appears that there were skid marks both in the plaintiff's lane of traffic and in the defendant's lane. The evidence is not conclusive as to the point at which the skid marks commence or to which automobile

such skid marks are attributable. Plaintiff sustained severe injuries including a fractured hip, fractured shoulder, rib fractures, which injuries necessitated his being hospitalized and undergoing considerable surgery. It appears that additional surgery has been recommended but that the plaintiff has been reluctant to undergo such recommended medical attention. It appears that the injuries resulted in some permanent disability and since there is no error urged with respect to the amount of the verdict no further consideration of the injuries or special damages is necessary.

It appears that the theory of defense was that the plaintiff was operating his automobile without head lamps and crossed into the defendant's lane of traffic. Since plaintiff's own testimony was contrary to this theory and since there was no conclusive evidence to support the theory of defense, the jury was warranted in finding the issues in favor of the plaintiff. The defendant claims reversible error, however, because of the court's conduct with respect to the testimony of a certain witness, Wallace Ames. The witness was a mechanic who examined the generator of plaintiff's automobile following the occurrence. He testified that he removed the generator and tested it but that because of certain worn parts the generator was not capable of producing an electrical charge. Because of such testimony, the defendant claimed that the lights on plaintiff's automobile could not have been operating at the time of the collision.

The testimony of this witness was received without objection.

During the course of defendant's closing argument reference was made to this testimony and defendant's counsel made strong argument to the effect that because of the condition of the generator plaintiff's lights could not have been operating at the time of the collision. Plaintiff's counsel made an objection to the argument and the court in response to the objection made a comment to the effect that the testimony referred to by defendant's counsel was not in evidence and that the jury ought to disregard such reference on the part of the defense. Counsel for both sides retired to chambers and following a conference defense counsel resumed his argument with respect to the inoperative generator. The argument was interrupted by the court on the ground that the court could not recall certain statements alluded to by the attorney for defendant. The plaintiff again made an objection which the court sustained. Nevertheless, the defendant continued his argument that the generator was found not ~~be~~ be in operating condition following the occurrence and that, therefore, the lights on the automobile operated by plaintiff could not have been operating at the time of the collision. Defendant's principal complaint is that the interruption of the court and the controversy with respect to the testimony of this witness created prejudice in that the jury was practically told to disregard the testimony. We do not think that this was necessarily prejudicial. Admitting that the generator was found not to be in operative condition at the time of the

examination and that at such time the generator was in the same condition as it was at the time of the occurrence, we do not think ^{able} it reason/to infer that the lights were not operating at the time of the collision, and we feel that the jury might very well have been instructed to disregard the testimony of this witness in that respect. Defendant's counsel argued that it is common knowledge that a generator incapable of producing an electrical charge could not make the head lights burn. However, it is also a matter of common knowledge that even though the generator reached such a worn condition that it could not generate enough electricity to operate the head lights, the battery in the automobile might still be sufficiently charged to maintain enough current to operate the head lights and other electrical equipment in the automobile. The testimony of the mechanic in no way precluded this alternative. We do not pretend to substitute our knowledge or analysis of the facts for that of the jury, but we do find that such alternative was available to the jury and hold the court would have been warranted in excluding the testimony of the mechanic as immaterial. This would not be true if there was no direct testimony with respect to the operation of the head lights on plaintiff's automobile, but since the plaintiff testified that his head lights were operating at and immediately prior to the collision, we think the testimony relating to the generator was too remote to raise an inference that the head lights had not been operating at such time. Had the mechanic testified that the battery in the automobile was also incapable of producing an electrical charge and that

the condition of the battery of the automobile was the same as it was at the time of the collision, we might take a different view. We do not think the court prejudiced the defense because of its comments or ruling with respect to the evidence. On the contrary, we think the defense gained an advantage by reason of the continued controversy during the argument. It is true that reference was made to the testimony of the witness having been stricken where such was not the fact, but since we feel that such testimony ought to have been stricken, we cannot agree that such mistaken reference was harmful. We do not think the court expressed an opinion as to the weight of this witness's testimony. The court merely made a mistake as to whether or not the witness did or did not make a certain statement during his testimony. Since the controverted testimony ought to have been excluded in the first instance, we feel that the defendant could not possibly have been prejudiced by the court's comments.

The defendant claims error on the ground that the verdict resulted from passion and prejudice. The defendant theorizes that because the evidence was sharply conflicting the jury was unduly influenced by the court's disposition of the testimony concerning the generator and, therefore, the verdict represents an erroneous disregard of the evidence. Such a theory presumes that the conduct of the court with respect to the questioned evidence constituted reversible error. We have already expressed our view on that point and accordingly hold that the evidence ought to have been excluded



and that the court's action was not prejudicial. It follows that any error the court may have committed was harmless and that the issues were properly submitted to the jury.

It is also urged that the plaintiff failed to prove due care on his part and that the verdict is against the manifest weight of the evidence. As we have pointed out, the evidence in this case was sharply conflicting. The only occurrence witnesses were the litigants themselves, each claiming that the other came over into the opposite lane of traffic. The plaintiff claimed his lights were operating and the defendant claimed that the lights were not operating. We do not find that the testimony of the plaintiff to be inherently false or improbable. Our courts of review have repeatedly stated the rule governing in a case of this kind. Where disputed questions of fact are presented to a jury, the findings of the jury will not be disturbed unless they are palpably erroneous. Robinson v. Workman 15 Ill. App. 2d 25; Griggas v. Clauson 6 Ill. App. 2d 412. We hold that the issues of negligence and due care were properly submitted to the jury for determination, and that this is not a case in which an opposite conclusion is clearly apparent.

For the reasons stated, the judgment of the Circuit Court of Menard County is affirmed.

Affirmed

ROETH, P.J. and REYNOLDS, J., CONCUR.



34 I.A. 203

34 I.A.² 203

FILED

(2)

FEB 17 1962

James R. McLaughlin

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A. D. 1961

Term No. 61-0-21

Agenda 12

| | | |
|----------------------------|---|-------------------|
| BARNEY D. HIRSCH, |) | |
| |) | |
| Plaintiff-Appellant, |) | |
| |) | |
| vs. |) | Appeal from the |
| |) | Circuit Court of |
| |) | St. Clair County, |
| HOWARD L. BOLLMEIER, d/b/a |) | Illinois |
| BOLLMEIER SUPPLY COMPANY, |) | |
| |) | |
| Defendant-Appellee. |) | |

CULBERTSON, J.

Plaintiff, Barney D. Hirsch, entered into a written contract with the defendant, Howard L. Bollmeier for the construction of a Standard Oil filling station in Millstadt, Illinois. The station was completed and payment in full was made to Bollmeier. Later, Hirsch brought suit in the Circuit Court of St. Clair County seeking to recover damages for alleged contract breaches. The breaches complained of were (1) deterioration of the concrete drive (2) failure to furnish a roof bond and flashing and (3) installing a four inch sewer line instead of a six inch line as required by the contract. The case was heard by the court without a jury and the plaintiff, Hirsch, was awarded \$6,000.00 which amount was subsequently

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reduced by the court to \$3,200.00. The plaintiff has appealed contending that the award is inadequate in the light of the evidence presented. The defendant has filed a cross-appeal claiming in the alternative that, (1) the judgment should have been in his favor, that (2) the award should have been for no more than \$984.00 and finally, that (3) the judgment for \$3,200.00 should not be increased.

The roof bond and flashing was furnished prior to the trial so this matter is not in issue.

The evidence in regard to the tile showed that the plaintiff was present when the tile was laid and further that he has had no trouble with the line since it was put in. Other evidence established that a four inch line is adequate for the building. In view of this, it would seem that the plaintiff's damages here are slight, as the contract in this respect was substantially performed by the defendant.

The real controversy centers around the concrete driveway which began scaling in the winter following the completion of the work. There is a conflict of testimony as to the actual ingredients that went into the concrete and also as to possible chemicals that the defendant contends were later put on the driveway by the plaintiff.

The question of the ingredients of the cement is twofold. First, there is a question as to the sand which was used. It is agreed by both sides that Mississippi sand was first used by the Ready Mix plant and later this was changed to Meramec sand, which costs a little more and is a finer sand than Mississippi sand. Neither type of sand was required by the contract specifications. Evidence presented by the defendant, consisting of his own

testimony and that of the Ready Mix operator, showed that the plaintiff ordered the change and paid the extra price for the Meramec sand. The plaintiff denies that he ordered the change, but he does admit that he paid the extra cost. There is a further question as to whether this change in sand would even have any effect on the concrete. A witness for the plaintiff, who was chief engineer for a highway and bridge construction company, testified that Meramec sand in a concrete job would in no way hurt the job. A highway engineer also testified for the plaintiff that he could see no harmful effect in the use of Meramec sand. The Ready Mix plant operator, a witness for the defendant, testified on examination by the court that there were no changes in the proportions of the mix when Meramec sand was substituted and he felt it should have been resubmitted to an engineer and redesigned because of the change of the type of sand in the mixture. A concrete engineer for the Missouri Portland Cement Company, testifying for the defendant, stated that changing the sand in the cement mixture from Mississippi to Meramec would have an effect upon the finished product in that it might cause scaling. Another registered engineer testified that changing from a coarse sand like Mississippi to a fine sand like Meramec would affect the wearing surface of the concrete in that it would be more likely to scale. Thus, the two parties are at odds as to who ordered the change in the sand and also whether this change would have any effect upon the finished concrete.

The second facet of the ingredients problem concerns an air-entrained additive which is put into cement. This additive in cement traps air into the cement and as a result gives the concrete

better resistance to weathering during the winter. Air-entrained concrete was required under the contract specifications and it is contended by the defendant that this was done by the Ready Mix plant when they mixed in an additive known as "Darex." Both sides agree that if "Darex" was added correctly, the concrete would, in this respect, conform to the contract. The only question is whether it was added by the Ready Mix plant. The tickets from the Ready Mix plant were introduced into evidence by the defendant, and the word "Darex Air" appeared on all the tickets, however, it was in a different handwriting than the rest of the bill. The Ready Mix operator, testifying for the defendant, said that he mixed the additive "Darex" with regular Portland Cement to make air-entrained concrete. This plaintiff testified as to a conversation he had with the Ready Mix operator, the defendant and a Mr. Scharf of the cement company on June 18, 1959. The plaintiff testified that Mr. Scharf asked the Ready Mix operator if he used air-entrained cement and the answer was that he used plain cement. Mr. Scharf testified for the defendant and on cross-examination he admitted to the conversation with the Ready Mix operator and further substantiated that the operator said he used ordinary cement. The fact that no additive was used at the Ready Mix plant came out again on a redirect examination by the defendant's counsel. Mr. Scharf also testified that the failure to use air-entrained cement is not a direct contributable cause to scaling. Witnesses for the plaintiff testified that if the cement was not air-entrained, it would be more likely to scale. Thus there is a clear split in the testimony of the parties and their witnesses as to whether the cement was actually air-entrained as required by the contract, and also as to the results if the cement was not air-entrained.

There is one other point of fact upon which the parties are in disagreement. The defendant contends that the plaintiff had the State Highway Department apply a chemical salt to the driveway the winter after completion to remove snow and ice and that this salt had an adverse effect on the concrete and thus caused the scaling. The plaintiff testified that he knew of no chemical of calcium or sodium which was applied to the drive although he admitted buying a 100 pound sack of rock salt for the driveway. Various employees of the plaintiff's station, the Highway Department and neighboring businessmen all testified that they had never applied or seen applied any chemicals from the State Highway Department. Mr. Scharf testified again for the defendant as to the conversation of June 18, 1959, when he asked the plaintiff if any chemical salt had been applied to the drive. According to Mr. Scharf the plaintiff stated that the State Highway Department had put some chemicals on. This admission by the plaintiff, as testified to by Mr. Scharf, appears to be the only evidence supporting the possible use of chemicals on the driveway. The evidence presented on the possible damage to the surface by the use of chemicals established that such chemicals would have a deteriorating effect upon "new" concrete. Witnesses for the defendant felt that such chemicals could have an extreme adverse effect upon "new" concrete such as was on the driveway. Mr. Scharf testified that such chemicals should not be used for three years after the driveway is completed. Another of the engineers for the defendant felt that calcium salt could deteriorate new concrete. A witness for the plaintiff, on cross-examination, testified that sodium chloride has an adverse effect on cement and will have a deteriorating effect on the surface.

Both sides agree that the concrete drive was not in the condition that it should have been and the defendant admitted on cross-examination that it did not look like a good concrete job. It is the defendant's feeling that the reason for the bad job was the change in the sand made by the plaintiff and the addition of salt shortly after the job was finished. The plaintiff's contention is that the failure to use air-entrained cement caused the bad condition. There is ample evidence to support a finding that the poor condition of the cement was caused by (1) the change in the sand from Mississippi to Meramec, or (2) the failure to include an additive in the cement to make it air-entrained cement, or (3) the actions of the plaintiff in putting a salt on the new concrete, or (4) a combination of any two or all three of these conditions.

The trial judge after hearing the conflicting evidence, concluded that the defendant was in some way responsible for the condition of the concrete, either entirely or in part. We feel from examining the abstract that there was evidence to support such a finding and thus no grounds for reversal in favor of the defendant can be found here. Where the testimony is contradictory as it was here we will not disturb the findings of the trial court unless such findings were manifestly against the weight of the evidence. (Northern Trust Company v. The City of Chicago, 4 Ill. 2nd 432.)

Assuming the defendant was in some way at fault in this situation, as was found by the trial court, the next question is whether the damages awarded the plaintiff were in conformity with law and with the evidence presented. The general rule in Illinois for awarding damages in a situation where there has been a breach

of a contract was set forth in the case of Paramount Pictures Distributing Corporation v. Gehring, 283 Ill. App. 581, at 591 where the court quoting from 17 C.J., pp. 847, 848 stated, "The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed. In other words, the person injured is, so far as it is possible to do so by a monetary award, to be placed in the position he would have been in had the contract been performed." Where a defect can be repaired the damages are usually the reasonable cost of such repairs. (Rehr v. West, 333 Ill. App. 160; Mason v. Griffith, 281 Ill. 246.) However, "If the defects are such that they cannot be cured without unreasonable economic waste, it is not the cost of curing them that will be awarded as damages. In such cases, the ratio factor is that between the market value of the defective performance rendered and the market value of the full performance promised." Corbin on Contracts, Chapter 36, §705. This rule has been adopted in Illinois for many years. (Lighthall v. Colwell, 56 Ill. 108; Spiro v. Cable, 248 Ill. App. 343.) In this case there is no question but what it would be an unreasonable economic waste for the driveway to be replaced, and the evidence showed that it could not be repaired in such a manner as to exactly conform to the contract. Thus, the measure of damages in this case is the difference between the value of the driveway as it should have been completed under the contract, and the value it actually had as defectively completed. Also the court took into consideration the possible acts of the plaintiff, himself, in applying chemicals to the driveway shortly after the work was

completed. The plaintiff's evidence as to the measure of damages was based upon the assumption that the driveway, as defectively completed, had no value. Thus, his evidence established that the measure of damages should be the cost of replacing the driveway which was shown to be \$9,000.00. The defendant's evidence as to the value of the defective driveway, established that the defective driveway could be resurfaced with blacktopping which it was admitted was not as satisfactory for filling stations as cement. The proof submitted by the defendant set forth a value for the completed defective driveway of about \$800.00 less than a driveway conforming exactly to the specifications, as a witness for the defendant testified that it would cost about \$800.00 to overlay the 7,000 square feet comprising the driveway. This overlay would be an asphalt finish which the witness testified that the government had taken in lieu of concrete with a change in price. Thus the evidence for the defendant tended to show a completed value for the defective driveway of about \$800.00 less than the actual cost of the driveway of \$9,000.00 or a value of approximately \$8,200.00. Somewhere between a value of \$8,200.00 which the defendant contends, and no value, which the plaintiff contends, was the value of the defective job as completed. The trial judge heard all of the contradictory evidence and observed the witnesses. He also observed the exhibits and photographs presented at the trial. He also determined from all of this evidence, the effect, if any, of the plaintiff's actions in applying chemicals on the new concrete. Considering all of these elements, it cannot be said that the decision of the trial judge awarding the plaintiff the sum of \$3,200.00 was not supported by the evidence and it is only in cases where the

decision is against the manifest weight of the evidence that the matter should be reversed. (Northern Trust Company v. City of Chicago, 4 Ill. 2nd 432.) Here the plaintiff, who the trial judge could reasonably have determined from the evidence, partially caused the scaling condition of the driveway, submitted proof that the defective driveway had no value. The defendant submitted proof that the driveway was worth upwards of \$8,200.00. Surely a decision awarding the plaintiff the sum of \$3,200.00 would not be against the manifest weight of the evidence in the light of such conflicting testimony.

For the reasons indicated, the judgment of the Circuit Court of St. Clair County is affirmed.

Judgment affirmed.

HOFFMAN, P. J., and Scheineman, J., concur.

Publish abstract only.

61012

IN THE

APPELLATE COURT OF ILLINOIS

Fourth District

MARJORIE G. LAKE, Administrator of the
Estate of Clarence Calvin Lake, Deceased,

Plaintiff-Appellant,

-vs-

LUTHER B. LAMP and J. C. McCANDLESS,

Defendants-Appellees.)

34 I.A. 203¹
FILED

FEB 17 1962

James R. McLaughlin

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

)
)
) Appeal from the
) Circuit Court of
) Clay County,
) Illinois.
)
)

Honorable Franklin R. Dove, Judge Presiding.

Scheineman, J.

The plaintiff appeals from a judgment on a verdict in favor of the defendants. It is asserted that the court erred in failing to direct a verdict in plaintiff's favor, in refusing a new trial or judgment notwithstanding the verdict, and in rulings on instructions.

Plaintiff's husband met his death when his car collided with the rear of a truck on a paved east and west highway of two lanes, and she sues as administrator.

At the place of the collision, there is a filling station and truck stop on the south side of the road, with four driveways connected to the road. The first driveway to the west is 60 feet wide, then a space of 153 feet to the second drive which is 56 feet wide, then a space of 252 feet to the third drive, having a width of 52 feet. The truck had been in this third driveway. The state maintained stop signs on all of the driveways. Although the highway was posted for 65 MPH,



there was a "Caution, Truck Entrance" sign west of the area. The collision occurred about 3:30 P.M. It was dark but the area is well lighted and the weather was clear and dry. The road is straight at this place and it is six tenths of a mile to the first curve to the west, from which direction the deceased had come.

The truck driver, called as an adverse witness, testified his tractor trailer had a total length of 43 feet. It had 10 speeds forward and 2 reverse. It was loaded with 36,000 pounds of corn. He stated that he started from the station in 2nd gear, he stopped a few feet from the pavement and looked both ways and saw nothing coming. He then started again in 2nd gear, then shifted into 3rd, 4th and 5th. Just after he got in 5th gear he felt the bump. He estimated the time elapsed from his stop at 30 seconds.

He is corroborated as to his movements by an employee who had serviced the truck. He saw the truck pull away, then turned and walked toward his station. He heard the air brakes, then the truck started again and shifted gears two or three times. As he entered his doorway he heard the crash and looked back, saw the car move to the left, then he went on and called the police and ambulance.

The only actual eyewitness was a lad aged 16 who was with some girls in a car in the 2nd driveway. He had not noticed the truck before, but he saw the car approach from his left (going east) and pass in front of him at 65 to 70 MPH. He looked to the right and saw the truck just the instant before the collision.

Two police officers came on the scene and made observations and measurements. They found the distance from the nearest edge of the drive to the point of impact, marked by debris, was 70 feet. The State Trooper testified this was from the east edge of the drive, and



that dust marks from the truck tires showed it had started onto the pavement from the middle of the 52 foot drive. Both officers said there were no tire marks of the car to indicate any application of the brakes prior to the impact. All the witnesses stated the rear of the truck had a number of lights on, numbers were stated from 6 to 9.

The plaintiff's argument is based in large part on mathematics. He uses formulae based on estimated speeds and distances. Suffice to say that the use of 70 feet as the distance the truck had moved has two fallacies. First, the wheels of a 43 foot vehicle do not track one behind the other in making a right angle turn, so that, for all wheels to come onto the pavement from the drive, the front must necessarily be some distance to the left of the right edge. The officers said they came from the center. Second, the point of impact was the rear of the truck, the front was 43 feet farther along. It is suggested that the car may have been dragged, but the eyewitness and the employee who turned at his doorway both said they saw the car bounce away from the truck toward the left.

By another computation counsel arrived at the astonishing conclusion that the truck started to enter the highway when the car was only one second away. That is an impossibility, for in view of the evidence as to relative speeds, the result would have been a crash into the side of the cab, or at most, the side of the truck. There could not have been a rear-end collision 70 feet from the drive.

When something happens so quickly, observations of speed and distance may not be accurate. But the young man's estimate of

the car's speed accounts for the terrific nature of the impact. And, like the state trooper, he noticed the white marks of the truck tires coming from the crushed rock drive, and found that the right turn had been made in about one truck length, and then the truck had gone straight two truck lengths before the crash, and this is quite consistent with the trooper's measurements. None of the witnesses indicated any doubt as to the place of impact.

There was testimony that the truck turns in 1st or 2nd gear at 4 to 5 miles per hour, which seems reasonable in view of its weight, and the series of 10 shifts available. It was put through the 3rd and 4th and into the 5th gear before the impact, and there must be a period of acceleration in each speed. The driver estimated the elapsed time at 30 seconds from his final stop to impact. The jury, as the judge of credibility, could certainly accept this as true, especially considering the well known slow motion of heavy vehicles in low gear. Comparing this with the very high speed of the car, completely unchecked, it is well within the scope of the evidence that the car was not in sight when the driver of the truck looked, and that he was not guilty of any negligence. Accordingly, we hold the court properly refused to disturb the verdict.

The plaintiff tendered two instructions quoting a statute, being Sec. 168, Ch. 95 $\frac{1}{2}$, Ill. Rev. St., as follows:

"The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right of way to all vehicles approaching on said highway."

To this quoted part there was added in one instruction a long statement authorizing, on conditions, a finding of negligence, and

in the other a similar reference to wilful and wanton misconduct.

A third instruction tendered, contained the quotation without the argument. All three were refused.

The rulings were clearly correct. This was not a collision at a private drive, nor is there anything in the evidence to show that where the truck came from had anything to do with the result. The witnesses commented on the brightly lighted area along these drives. The employee at the door of his garage had no trouble seeing the truck. The lad in the car, some 400 feet from the point of impact, saw the truck the moment he turned his head in that direction. If the deceased had seen the truck as he passed by the eyewitness, he had plenty of space in which to slow down or swerve, or both. There was no evidence of any other traffic at the time and place. The failure to do anything makes it inescapable that he did not see the truck, even though it was in plain sight in a lighted area. It would not have been any plainer or easier to see if it had come from some other place farther away.

These traffic laws concerning right of way of "approaching" vehicles cause much difficulty, and it has been repeatedly held that instructions in the language of the statute would only mislead or confuse the jury. City of Edwardsville v. Ill. Term. R. Co., 350 Ill. App. 63; Walker v. Shea-Matson Tr. Co., 344 Ill. App. 466; Partridge v. Enterprise Transfer Co., 307 Ill. App. 386; Salmon v. Wilson, 227 Ill. App. 286. These were all intersection cases, but much of the reasoning is applicable to this statute also. The principle that there are considerations of speed and distance which affect the definition of an "approaching" vehicle, applies in this type of case, as well as in crossing cases. And, in addition, when a



vehicle has proceeded on its way after coming from a private drive, there must be some place where it no longer can be identified as one that has entered from a private drive.

The argument that plaintiff had a right to an instruction on plaintiff's "theory of the case," overlooks the fact that the tendered instruction must not only state the law correctly, but must be applicable under the evidence.

The ponderous vehicle came out of the drive in such a low gear it could proceed only at a man's walking pace. After completing its turn and going on a straight line, it accelerated through several gear combinations. From the lane where the lad was, to the next lane was 252 feet and that next lane was 52 feet wide. This is 304 feet. Thus, when the car flashed past the lad, the rear of the truck was distant 302 feet, plus whatever part of the 70 feet it had covered. When a vehicle has been able to come out of a drive and straighten out and start to accelerate, while the nearest vehicle to the rear is still more than 300 feet away, we hold that the statute relied upon by plaintiff is not applicable, and no instruction should be given on it. The judgment is affirmed.

Judgment Affirmed.

Hoffman, F.J., and Culbertson, J., concur.

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In The

APPELLATE COURT OF ILLINOIS

Fourth District

| | | |
|-------------------------------------|---|--------------------|
| JAMES CANNON, a minor, by Irene |) | |
| Cannon, his mother and next friend, |) | |
| |) | |
| Plaintiff-Appellant, |) | Appeal from the |
| |) | Circuit Court of |
| -vs- |) | Williamson County, |
| |) | Illinois. |
| |) | |
| DAVID THOMPSON, defendant, and |) | |
| GENERAL TELEPHONE COMPANY OF |) | |
| ILLINOIS, |) | |
| |) | |
| Defendant-Appellee. |) | |

Honorable C. E. Wright, Judge Presiding.

Scheineman, J.

Plaintiff is appealing herein from the trial court's action in dismissing Count II of his complaint and entering judgment for the defendant, General Telephone Company of Illinois, with a finding that there was no just reason for delaying an appeal. The suit involved a claim for damages for injuries incurred by a guest when the car in which he was riding struck a utility pole erected and maintained by the defendant within approximately 18 inches of the edge of the paved portion of the street on the west side thereon, in the City of Centerville, Illinois.

The pertinent portions of Count II are: that plaintiff was riding as a guest in a car driven by David Thompson and owned by the latter's father; that David Thompson was driving in a southerly direction along South Division Street; that "he drove the southbound automobile off the paved portion thereof and into and against the telephone post located near

the west edge of the paved portion of that street, " that plaintiff was thrown and injured.

It was further alleged that defendant had a duty to exercise reasonable care to construct, maintain and locate its posts "so as to not injure motorists traveling along the public street, including the plaintiff." It then alleged that plaintiff's injuries were directly and proximately caused by negligent acts or omissions of the defendant stated to be:

"(a) Defendant negligently and carelessly constructed its post so close to the paved portion of the highway when it knew, or by the exercise of reasonable care should have known, that users of said highway would necessarily strike it if unintentionally deviating from the highway.

(b) Defendant negligently and carelessly continued to maintain said post in close proximity to the pavement of South Division Street when it knew or by the exercise of reasonable care should have known that said post would cause motorists to be injured.

(c) Defendant negligently and carelessly constructed and allowed said post to remain near the paved portion of said highway thus and thereby creating a dangerous hazard to motorists lawfully using the highway, including the plaintiff.

(d) Defendant negligently and carelessly failed to reflectorize or illuminate said post or to give notice of its existence to motorists using said highway.

9. At all times herein mentioned, plaintiff was in the exercise of due care and caution for his own safety."

and the same day, the 1st of June, 1864, the

same day.

I am, Sir, very respectfully,
Your obedient servant,

Wm. L. Garrison, Secretary of the
American Anti-Slavery Society.

Received of the Treasurer of the
American Anti-Slavery Society, the sum of

Twenty Dollars, for the purchase of
books.

Witness my hand and seal, this 1st day of
June, 1864.

Wm. L. Garrison, Secretary of the
American Anti-Slavery Society.

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Although there are many reported cases involving vehicles that collided with posts, there are few that came to the reviewing court at the pleading stage. Plaintiff cites *Kubala v. Dudlow*, 17 Ill. App. 2d ⁴⁶³ 453. The complaint charged that the defendant maintained concrete posts abutting the highway, that they were a nuisance because they were located on a sharp turn in the road, that there were no markings indicating the curve, nor warning of the posts, and specifically that defendant had actual knowledge of the risk because of injuries to other travellers on many occasions, who had been unable to traverse the curve and who had deviated unintentionally from the highway and struck the posts. The complaint was held sufficient.

Apparently the case involved a rural area where the speed of traffic must be allowed for. The alleged facts indicated the situation was likely to be dangerous to traffic, and also there was set up a basis to say that the defendant was reasonably chargeable with knowledge of that danger. There is a conspicuous lack of such averments in the complaint before this court.

The plaintiff also cites a general rule that, where poles are placed in a public highway or so close to the traveled way as to constitute a hazard to persons lawfully using the way, the utility company is liable for injuries caused by a collision with the pole. This principle is annotated in 98 A.L.R. 487 and again in 3 A.L.R. 2d 8-78.

The notes digest a large number of cases from many states, which have applied the rule, at least in rural areas. However, the opinions usually state facts as to the situation, which were regarded as sufficient to make the question of negligence one for a jury. The

majority of the cases limit the rule when the case arose in a municipality, especially when the pole was off the paved portion of the street, e. g., in a parkway. The note in 3 A.L.R. 2d, supra, contains a summary of the cases where the pole was in a parkway between sidewalk and gutter, as follows:

"While under most circumstances it would seem clear that the location of public utility poles in such an area could not be said to constitute negligence on the part of the owner of the pole, actionable negligence has been claimed to have existed in a number of cases, where, because of "bottlenecks," "jogs," curves or other conditions - - - motorists have failed to follow the line of travel as outlined by the space between curbs, and have driven over the curb onto the parkway and into a public utility pole." This is accompanied with digests of cases where such conditions have been held to present a jury question, and others which hold that poles placed in a parkway in accordance with the municipal arrangements, cannot create liability.

The accompanying reported case is *Wood v. Carolina Tel. & Tel.* 228 N. C. 605, 46 S. E. 2d 717, 3 A.L.R. 2d 1. A flat tire resulted in a vehicle hitting a pole 6 inches behind the curb. The court said "it is a matter of common knowledge that the space between the sidewalk and street is used for the location of telephone poles, traffic signs, fire hydrants," etc., and that "in no sense do such structures constitute a hazard to or in any wise impede the free use of the vehicular lanes of traffic." It was held the motorist cannot complain that objects in the grass plot between the sidewalk and the street, "or along the sidewalk" obstruct his free use of the traffic lane.

Other cases cited reach a similar result. In *Payse v. Kansas*

Gas & E., 138 Kan. 434, 26 P. 2d 255, a motorist on a misty night went over the curb and struck a pole 16 inches back of the curb, at a curve. It was held a demurrer to the evidence was properly sustained, the court saying that the pole was presumably so placed with the permission of the city and did not appear to be a departure from the approved plan.

Clickenbeard v. St. Joseph, 321 Mo. 71, 10 S. W. 2d 54, involved a collision with a pole one foot back of the curb. The court observed that poles are so placed with the permission and acquiescence of the city for the necessary public use and in the same manner and same distance from the curb as similar poles erected and maintained along other streets. It was held the position of the pole could not be a basis for a charge of negligence.

Similar results appear in: Matucci v. Ohio Edison Co. 79 Ohio App. 367, 73 N. E. 2d 809; Cramer v. Detroit Edison Co., 296 Mich. 662, 296 N. W. 831; Greenland v. Des Moines, 206 Ia. 1298, 221 N. W. 953; State v. Consumers Power Co., 119 Minn. 225, 137 N. W. 1104; Southern Bell v. Edwards, 253 Ky. 727, 70 S. W. 2d 1; Vigeant v. Postal Tel. Cable Co., 260 Mass. 335; Peninsular Tel. Co. v. Marks, 144 Fla. 652, 198 So. 330.

In Illinois, the location of utility poles within municipal limits is subject to regulations by the civic authorities. Ill. Rev. St. Ch. 134, Sec. 4. It is the prevalent custom to locate them in parkways in residence districts, and in downtown areas they are usually adjacent to the curb, along with supports for the street lighting system, fire plugs, mail depositary items, parking meters, etc.

The complaint here does not charge that the pole was not placed

according to local regulations, nor is there any statement of facts to indicate that it differed from the thousands of other poles in cities where it would often be impractical to provide a set-back of more than 18 inches. The mere characterizations of acts or conduct, without any supporting facts, are but conclusions of the pleader. 30 ILP Pleading, Sec. 7.

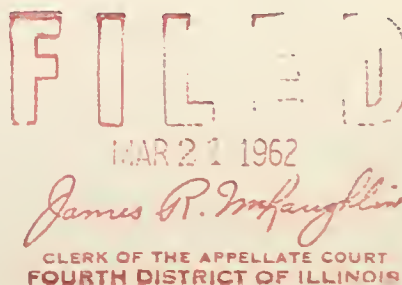
The complaint also fails to state any facts as to what happened, or why the car left the pavement. Plaintiff contends this was unnecessary, because negligence of the driver cannot be imputed to the guest. This argument misses the point. It is not a question of contributory negligence, but whether the facts would support the charge of negligence and proximate cause. The facts would have to present a situation where, if proved, it could reasonably be said that the result was foreseeable. Foreseeability is the very basis of tort liability. *Kuhn v. Goedde*, 26 Ill. App. 2d 123.

After verdict courts are liberal toward the sufficiency of a pleading, but when attacked by direct motion before trial, conclusions of the pleader are no substitute for statements of ultimate facts. *Stedman v. Spiros*, 23 Ill. App. 2d 69, 81. The plaintiff has the burden of both pleading and proving facts which will make a case submissable to a jury. We cannot hold that the mere fact of a pole being within 18 inches of the edge of the pavement, but outside of the traveled way, creates an automatic liability. It is our conclusion that the complaint failed to state a cause of action and the court properly dismissed it. The judgment is affirmed.

Judgment Affirmed.

Hoffman, F.J., and Culbertson, J., concur.

Publish Abstract Only.



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A. D. 1961

34 I.A. 2 238

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

CHARLES E. BARNES,

Plaintiff in Error.

Error to The County

Court of Winnebago

County.

SMITH, J.

A jury found the defendant guilty of driving a motor vehicle while under the influence of intoxicating liquor in violation of the provisions of Ill. Rev. Stat., 1957, Chapt. 95 1/2, Par. 144. Defendant's motion for new trial was denied, judgment was entered on the verdict and a fine of \$200.00 and costs imposed. In seeking a reversal in this Court the defendant contends that, (a) the evidence does not establish his guilt beyond a reasonable doubt, and (b) the jury was improperly instructed.

Count 1 of the information, charging the defendant with driving in violation of restrictions on his operator's license, was quashed by the Court. On Count 2, charging the defendant with driving after revocation of his license,



331
The Court directed a verdict of not guilty at the close of the People's case on the first trial. On August 2, the jury was unable to reach a verdict on the first trial and, on the second trial, returned a guilty verdict. Writ of Error to this Court followed in due course.

This case is posited in the following factual background. The defendant Barnes, a real estate broker, had negotiated a contract for the appearance of a carnival or circus at the North Towne Shopping Center in Rowland. After the circus closed shop for the evening the defendant Barnes, Marjorie Hogan, his secretary, Paul Miller, owner of the circus, and his associate or publicity man, Gene Tracy, gathered about 12:30 A. M. at the Barnes office at the shopping center for the purpose of discussing a contract for the following morning. Miller brought with him a bottle of Scotch whiskey and the men had some drinks. Marjorie Hogan had none. The testimony as to the amount consumed by the men poses the usual lack of precision and varies from half the bottle to two or three drinks per person. It was apparently raining heavily during the early morning hours and the meeting did not break up until about 4:30 A. M. The circus men left on foot for their trailer on the shopping center parking lot. Mrs. Hogan and the defendant got into Mrs. Hogan's car and headed south on North Main Street. The apartment where each resided on separate floors. Mrs. Hogan testified that as she applied her brakes, her car skidded into a telephone pole near the curb on the west side of North Main Street, she backed away, the car pulled to the left across the street and about sixty feet south of the pole, coming to rest near a tree with its front end at the curb line and the rear end in the street. Traffic lights on North Main Street and Nicola arrived in a matter of minutes. The defendant was behind the wheel. Marjorie Hogan was then out of the car or

...ting out of the car. She and Barnes both testified that she was driving and, when the car came to a rest, she got out and Barnes moved over to the driver's side to see if he could straighten up the wheel. These facts are basically not in dispute except as to the identity of the driver of the car and as will be noted in a discussion of the issues.

The issues in a criminal case of this nature are relatively simple. The burden is on the People to prove the corpus delicti and the guilt of the defendant beyond a reasonable doubt. The same evidence may establish that the crime was committed and that the defendant committed it. People v. Gavarrak, 2d 190, 117 N.E. 2d 782; People v. Brown, 379 Ill. 262, 40 N.E. 2d 66. The corpus delicti in the case at bar consists of two essential elements. One is that the defendant was driving the motor vehicle at the time and place in question. The other is that he was then under the influence of intoxicating liquor. People v. ..., 23 Ill. App. 2d 352, 163 N.E. 2d 308. The first assignment of error is directed to the corpus delicti and requires a further consideration of the evidence.

On the issue of intoxication the evidence was conflicting. Officers ... and Nicosia testified that he was. The defendant and Miller testified that he wasn't. Tracy wasn't asked. Marjorie Hogan was equivocal and evasive and didn't be a judge of that". Her testimony exudes the thought that, if he wasn't intoxicated, she would readily have so stated. Defendant's conduct at the scene is in accordance with the testimony of the officers. When Officer Hodge asked him to get out of the car "he didn't say anything for a while--five minutes or more". He gave no attention to the injured woman and then returned and asked the defendant for his driver's license. Still no answer. After a while the defendant

got out of the car and came over to Mrs. Hogan. He wanted to go to the hospital with her. Her injuries were superficial and, when permission was refused, the defendant became belligerent, was handcuffed, and forcibly placed in the squad car. The explanation for his presence behind the wheel now given was not mentioned at the scene--a circumstance wholly inconsistent with the normal conduct of a sober motorist. This circumstance is pregnant with the thought that the defendant was either under the influence of intoxicating liquor or that the explanation now given is a patent afterthought. Mrs. Hogan's condition adequately explains why she was never apparently asked about it at the scene, nor did she volunteer any comment. In this state of the record we cannot and will not substitute our judgment for that of the jury. The credibility of the witnesses and the weight to be given their testimony, conflicting as it is, is for the jury. People v. Coulson, 13 Ill. 2d 215, 149 N.E. 2d 88; People v. Tansley, 3 Ill. 2d 215; 122 N.E. 2d 155.

"A conflict in the evidence does not itself establish a reasonable doubt, and a jury verdict based on credible and substantial evidence is not rendered reversible by the fact that there was other evidence in the case which might, if believed, have resulted in a different verdict. People v. Newkom, 16 Ill. 2d 340; 158 N.E. 2d 53; People v. Kelly, 8 Ill. 2d 604, 186 N.E. 2d 785." We cannot say that the verdict of the jury is unreasonable, improbable or unsatisfactory or that it raises any reasonable doubt of the intoxication of the defendant within the meaning of the statute here involved.

The second essential element of the corpus delicti is that the defendant was driving. Observation of the defendant in the act of driving is not an indispensable prerequisite for conviction, provided that the act of driving while under the influence of intoxicating liquor is established by other credible and

substantial evidence either direct or circumstantial. People v. Garnier, 20 Ill. App. 2d 492, 156 N. E. 2d 813. Proof of the defendant's driving must rest on the testimony of Officer Pearce that he saw the defendant get in on the driver's side and drive away, and on the circumstance that the defendant was behind the wheel when Hodge and Nicolsia drove up. Actual driving rests on the testimony of Pearce and it is suspect. On the first trial he testified that the weather was "warm and clear" and that it "hadn't rained all night". The testimony of all witnesses on both sides was that it had rained hard that night and early morning and that it was drizzling at the time of the accident. He drove through the shopping center and didn't see the circus set up and battened down. All other witnesses so testified, including his fellow officer. He testified that Barnes came out the north door of the office. All others testified that they came out the back door. He never mentioned Miller or Tracy. Pearce and his fellow officer, Coricossi, varied greatly as to where their car was parked at the shopping center. Barnes, Mrs. Hogan, Miller and Tracy all testified that Mrs. Hogan drove the car away from the office on the evening in question. The word picture painted by Pearce does not consist of slight inconsistencies and variations common to every jury trial. Pearce saw nothing that everyone else saw, and he saw the one thing that nobody else saw. His testimony may be said to fill a void in the People's case but, like skim milk, it is filling but not very satisfying. A careful consideration of his testimony compels the conclusion that it is neither credible, reasonable, probable or satisfactory.

Defendant's driving must then be grounded on the circumstance that he was behind the wheel when Officers Hodge and Nicolsia arrived. Ray Tunison, who resided at the second house down on an intersecting street was loading

his car with fishing equipment. He went down to the corner, saw the car backing away from the telephone pole, returned to his house and then heard a second "scraping" noise. He debated about calling the police, and about then the police car drove up. One to three minutes elapsed from the time Tunison heard the second noise to the arrival of the police car. On the first trial officer Hodge testified that Mrs. Hogan was out of the car when they arrived. On this trial he testified that he saw her getting out. He further testified that "the door was open and she was a few feet outside the door". The record is wholly silent as to which door he made reference. His partner Nicosia stated "don't remember-- she was out of the car". A nurse riding in the car of the officers was not called as a witness by either side. Mrs. Hogan testified that her knee injury resulted from striking the ignition key and her head injury was caused by striking a Kleenex box on the sun visor. Both the Kleenex box and the ignition key were on the driver's side and the ignition key was bent. The car, as we have said, belonged to Mrs. Hogan. Both Barnes and Mrs. Hogan testified that she was the driver. If he was as intoxicated as this record suggests, it is possible but somewhat improbable that she would let him drive. Both explain his presence under the wheel when the officers arrive. Circumstantial evidence is legal evidence, yet to warrant a conviction on such evidence the facts proved must so thoroughly establish the guilt of the person accused as to exclude every reasonable hypothesis of his innocence". People v. Richardson, 21 Ill. 2d 435 at 438, 158 N.E. 2d 801 at 802. We observe in passing that this rule was not included in the People's instruction on circumstantial evidence although it was probably adequately covered in defendant's No. 7 in an unrelated manner.

In this state of the record, "it is the duty of this court to resolve

all facts and circumstances in evidence in the trial, of innocence rather than guilt if that reasonably may be done, and where the entire record leaves us, as this one does, with grave and substantial doubt of the guilt of the defendant, we will not hesitate to reverse the judgment."

People v. Bougard, 16 Ill.2d 503 at 507, 156 N.E. 2d 596

at 598. Perceiving no useful purpose in remanding this case for a third trial, it should be, and it is, hereby reversed.

Reversed.

McNeal, J. concurs.

Dave, P.J. dissents.

If the defendant was intoxicated to the extent indicated by the opinion I am unable to understand how he was able to get behind the driver's wheel after the car came to a rest and the few minutes that elapsed before officers Hodge and Nicosia arrived. If the defendant was a drunk as the record indicates why Mrs. Hogan permitted him to change seats with her or why she thought he could be of any assistance is inexplicable. Officers Hodge and Nicosia testified he was drunk. The defendant testified he was not, but his conduct indicated otherwise. When Officer Hodge asked him to get out of the car, he said nothing or did nothing for five minutes or more and when asked for his driver's license made no reply. As stated in the opinion there was no explanation given by him or Mrs. Hogan, at the time of his arrest, for his presence behind the driver's wheel. The jury heard the testimony and were justified in

concluding that the explanation made at the trial was an afterthought. The jury heard the testimony of Officer Pearse to the effect that he observed the defendant get in the car and drive away. The credibility of his testimony and that of all the other witnesses was a question for the jury to determine. In my opinion, the judgment should either be affirmed or, if reversed, the cause should be remanded for a new trial.

Wm. J. Collins

Dover, N.H. 11/15/1918

7

Agenda No. 5

February Term, 1962

Appeal from the
Circuit Court of
McHenry County.

VS.

HEBRON PACKING COMPANY, a
Corporation,
Defendant-Appellant.

This is an action brought by Raymond Anderson to recover damages for injuries he received when he jumped from the rear of a trailer truck which he was unloading on the premises of the defendant, Hebron Packing Company. The issues made by the pleadings were submitted to a jury resulting in a verdict and judgment for the plaintiff for \$4,000.00. To reverse this judgment defendant appeals.

The evidence discloses that the defendant operates a meat packing plant east of Hebron, Illinois, near Route 173. The building in which it operated was a one-story cement block building with a basement. On the east side of the building was a ramp 53 feet in length leading from the basement floor to the ground level. The distance from the basement floor to the ground level was $9\frac{1}{2}$ feet and the ramp rose at an angle of 45 degrees and was 12 feet wide, according to the testimony of the plaintiff.

Plaintiff was an employee of Steffke Freight Lines and delivered freight for that company. On the morning, of March 28, 1958 he left the Steffke Freight Terminal at Woodstock with a tractor-trailer which belonged to his employer. He testified that he did not know who had loaded the truck but before leaving the terminal he inspected it and found it was loaded with cardboard cartons, processed with water-proofing material or waxed on one side and tied in bundles, each bundle weighing between 50 and 60 pounds. These bundles were stacked on top of each other in the trailer and at the rear end of the trailer the stack was approximately five feet high and sloped downward toward the front of the trailer.

Upon plaintiff's arrival at defendant's plant he gave the superintendent the bill of lading. The superintendent told him, in response to his inquiry, to unload the cartons in the basement. Plaintiff had previously delivered to defendant the same type of cartons ten or twelve times and other merchandise on an average of 3 or 4 times a month, on these occasions, however, he used a dock about 5 or 10 feet from the ramp. After the superintendent told him where to unload, Mr. Anderson proceeded to back the tractor-trailer down the ramp. When he got the trailer in the desired position the front wheels were on ground level and the rear wheels of the tractor were on the ramp. The plaintiff then set the air brakes and got out of the tractor, blocked the wheels of the unit and went to the rear of the trailer. Plaintiff testified that it was part of his job to unload the cartons and that upon this occasion he unloaded them for his employer, Steffke Freight Company.

Upon arriving at the rear of the trailer, plaintiff found three men there, employees of defendant. These men were waiting there in order to help plaintiff unload. Plaintiff testified that he said to these three men to stand back because when he opened the doors of the trailer he didn't know what was going to happen. As abstracted plaintiff then testified:



"I opened the doors alone and as soon as I opened the door part of the load shifted to the back end of the trailer out onto the ground. Probably 20 or 30 bundles fell on the ground. They shifted right out. The three men and myself picked up the boxes and whatever we could reach from standing on the ground, we took off the back of the trailer. The back of the trailer was about $4\frac{1}{2}$ to 5 feet from the ground. I could reach about 4 to $4\frac{1}{2}$ feet into the trailer from the ground. The load was unloaded by hand, which is the usual and customary way. After 4 or 5 feet had been cleared from the rear of the trailer the rest of the load was probably 4 feet higher. When I climbed into the trailer there was nothing unusual about the appearance of the rest of the load. It appeared as it had when I inspected it when I left Woodstock. I got up into the trailer. None of the other 3 men got up there with me. I started to carry the bundles of cartons to the back or rear of the trailer. I lifted them up by hand and carried them down to the end of the trailer and the three men picked them up and stored them inside. I carried approximately 8 or 9 bundles before something happened. As I bent over to pick up a bundle approximately 3 feet off the floor, I noticed that the rest of the load started to shift, so I dropped the bundle and started, was starting to get away from the load, went out the back of the trailer, fell to the ground and part of the load came out on top of me. As I picked up this bundle just before I jumped off the truck I saw the cartons were coming back toward the end of the trailer. They started to shift back to the end of the trailer. The cartons were coming off the stack. They were stacked approximately 4 feet high and they would slide on top of one another and toward the back of the trailer. They came fast. Approximately 3 rows started to slide back. As soon as I saw the bundles start to shift, I dropped the bundle I originally started to pick up and went out the back



of the trailer. I hurried. I went off the rear of the truck and the cardboards on top. The cardboards were right behind me. Most of them struck from the waist on down. I grabbed my leg and the 3 fellows helped remove some of the cardboards on top of me and one fellow ran to the office and the plant superintendent came. I would say approximately 20 to 25, possibly 30 bundles fell on me. They weigh 50 to 60 pounds apiece".

On cross examination plaintiff testified that he possibly thought some of the cartons might fall out of the door when he opened it and that is why he told the three men, who were there to assist him in unloading, to stand back. He said that when he was unloading the cartons he did not slide any of them out of the trailer but he carried them to the back of the trailer and handed the cartons to the men who were assisting him; that when he saw the bundles start to slide he ran toward the back of the trailer and in doing so may have slipped but when he arrived at the back of the trailer he "anticipated that the load might slide out. It was in my mind that it could happen. I was going to get away from it if it did. I was not going to take a chance. I knew the condition of the ramp. I could see it. I knew my trailer was at an angle. Not all the bundles fell out of the trailer. It was my opinion that the bundles fell due to the steep ramp". This witness then testified that the cartons were loaded in the usual manner; that the cartons were purposely stacked the way they were in order to put the greater weight on the rear end of the trailer; that when he lifted the bundle just before the accident, that bundle was not noticeably bracing the pile in any way; that at that time he did not notice anything unusual in the appearance of the load and "didn't actually suspect that it might shift as suddenly as it did".



Counsel for appellant contend that the uncontradicted evidence discloses that plaintiff voluntarily exposed himself to danger; that he chose to unload his trailer in the place and in the manner he did; that in doing so he recognized a hazard which he assumed and in so doing he was contributorily negligent as a matter of law. It is also insisted that there is no evidence in the record of any negligence on the part of the defendant.

Counsel for appellee insist that the evidence discloses that plaintiff did not expose himself to any open and visible danger and that the evidence of negligence on the part of the defendant and due care on the part of the plaintiff was sufficient to require these issues to be submitted to the jury. "It is fundamental", insists counsel, "that reasonable men will sometimes differ as to what can reasonably be deduced from the same evidence. That is why it is so important that questions of fact should be passed on by a jury and why, under our system of justice, this unique function of the jury is so jealously protected by our courts, both at the trial level and upon review".

This record discloses that plaintiff is an experienced truck driver and inspected the load he was transporting before he left Woodstock on the morning of March 28, 1958. He knew what the load consisted of and was familiar with the cartons, their size and weights, how they were bundled and how they were loaded in the trailer. He had hauled similar loads on prior occasions. He was familiar with defendants premises and its loading and unloading facilities,



its dock and its ramp. Upon a previous occasion he had backed a tractor into this ramp and hooked a trailer on to it and pulled the trailer up the ramp. Upon arriving at defendant's plant he inquired where he should unload his cargo and was told to "put it in the hole ". Plaintiff testified he knew what this expression meant and he proceeded to put his trailer in the position he, the plaintiff, desired it to be. He set the air brakes, got out of the tractor cab and blocked the wheels. He testified that he knew that the trailer was then positioned at a 45° angle. He testified that in this position he knew that the cartons were likely to shift and therefore he directed those men who were waiting to assist him to stand back before he opened the rear doors to the trailer. When he opened the doors he observed that the load had shifted and 20 or 30 bundles fell to the ground. After those had been picked up he got into the trailer. He testified that he anticipated that the load might shift and slide out but didn't "suspect that it might shift as suddenly as it did". When the anticipated shift came and the movement of the cartons occurred he attempted to get to a place of safety and in order to do so jumped out of the rear of the trailer and was injured.

The complaint charges that defendant erected and maintained the ramp in question at an angle that was dangerous and unsafe for the unloading of plaintiff's trailer and that defendant directed plaintiff to park his trailer for the purpose of unloading in a position that was dangerous and unsafe.



There is no evidence in this record that defendant directed plaintiff to back his trailer down the ramp for the purpose of unloading it. By telling plaintiff that the cartons, were to be "put in the hole" defendant's superintendent did not indicate to plaintiff where the trailer should be placed or how he should proceed to unload his trailer. Plaintiff was an employee of Steffke Freight Lines. As such employee he testified that it was his duty to remove the cartons from the trailer and unload them. Plaintiff could have unloaded them in any manner he chose. He was not under the direction of defendant. He took charge of the unloading process. He placed his trailer in the very position he desired it to be. He said it was on a 45° ramp. He anticipated, when the trailer was so positioned, that some of the cartons might shift and be held in the trailer by the doors and that when the doors were opened those cartons would slide out of the trailer. Just what he anticipated might happen did happen and 20 or 30 cartons fell out. Knowing that these 20 or 30 cartons had fallen out due to the position of the trailer, plaintiff thereafter entered the trailer and lifted a carton which he did not think was bracing the other cartons. When he did so the pile shifted quicker or more suddenly than he anticipated and, recognizing the danger, he hurriedly ran to the rear of the trailer, jumped and was injured.

Defendant did not direct plaintiff to back his trailer down the ramp. The contents of the trailer could have been unloaded at the top of the ramp with the trailer in a level position. Plaintiff was free to use any method he desired. Defendant never directed plaintiff to enter the trailer after he had placed it at an angle, or ~~any~~ at any other time. Defendant had nothing to do with the loading of the trailer and did not know in what manner it was loaded. Plaintiff did know and he had sole charge of unloading it.



Appellee insists that the character and condition of the ramp and whether it could safely be used for the delivery of these cartons was uniquely within the special knowledge of the defendant; that defendant's superintendent could have had plaintiff deliver the cartons to the dock adjoining the ramp; that the grade of the ramp was too steep for this type of a load and it was clearly the duty of defendant's superintendent to warn plaintiff of the hazard involved. In support of this contention counsel cite Calvert vs. The Springfield Light and Power Co., 231 Ill. 290.

The Calvert case was an action to recover for the alleged wrongful death of Cecil Calvert. It appeared that defendant was the owner of a building in the City of Springfield upon which was located several metal smoke stacks. The roof was a flat surface covered with inch boards which were covered with tar paper. Plaintiff's intestate was an employee of Wm. Drake, a contractor, who had a contract with defendant to remove these stacks. Some weeks before the workmen of Drake commenced to remove the stacks, one of the ^{stacks} had fallen and broken an irregular hole through the boards and tar paper on the surface of the roof. This hole was visible to the workmen but the evidence tended to show that immediately adjoining the hole, while the tar paper remained intact, the boards underneath were splintered and broken. This condition was visible to persons in the building but not to persons on the roof. The deceased, while engaged in removing one of the stacks, stepped upon the roof near the hole, broke through the tar paper and fell, receiving injuries from which he died.

In affirming the judgment of the appellate court which affirmed the judgment of the circuit court in favor of the plaintiff and in holding that deceased was not guilty of contributory negligence and had not assumed the risk of being injured, the Supreme Court, omitting citations said: (pp. 293-4) "The law is well



settled that an owner or occupant of land who, by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist without timely notice to the public or to those who are likely to act upon such invitation, and if there are hidden dangers upon the premises he must use ordinary care to give persons rightfully upon the premises warning thereof, and that the owner owes such duty to an independent contractor or his servants while working upon his premises. When, therefore, the appellant contracted with William Drake to remove said metal stacks there was an implied invitation to Drake and his workmen to go upon the roof of said building to remove said stacks, and it was the duty of the appellant to exercise reasonable care for the protection of appellee's intestate while he was in the exercise of due care for his own safety and while he was upon the roof of said building engaged in removing said stacks, and if there was a hidden danger located in the immediate vicinity of where the deceased was at work which was known to it and which was unknown to the appellee's intestate, as the evidence fairly tends to show there was, it was the duty of the appellant to notify the deceased of such danger, and for a failure so to do, which resulted in the loss of appellee's intestate's life, the appellant was liable".

What the court held in the Calvert case was that plaintiff's intestate, an employee of the contractor, whom defendant had employed to remove the metal stacks from the roof of defendant's building, had an implied invitation to go upon the roof and it was the duty of defendant to exercise reasonable care for the safety of plaintiff's intestate while he, plaintiff's intestate was in the exercise of due care for his own safety.



It was also held that it was the duty of the defendant to notify plaintiff's intestate of a hidden danger in the immediate vicinity of where deceased was working which danger was known to the defendant and which was unknown to decedent.

In the instant case there was no unsafe condition on defendants premises and there was no hidden danger of any kind or character and defendant concealed nothing from the plaintiff. The character of defendant's ramp was known to plaintiff and whether it could be safely used for the delivery of plaintiff's cargo was not within the special knowledge of the defendant as counsel for plaintiff assert. Counsel for plaintiff further state that plaintiff deferred to the superior knowledge of the superintendent of the defendant to the effect that this delivery could be made in the way it was made without any hazard. There is no evidence in this record that the superintendent of defendant or any of defendant's employees ever stated or intimated to plaintiff that the unloading could be done without hazard if plaintiff used the ramp in the way he did. The ramp was open and visible. The defendant, under the facts in the instant case, had no duty to warn the plaintiff of any hazard involved in unloading the trailer on the ramp. The factual situation and relationship between the plaintiff and defendant in the instant case are entirely unlike those in the Calvert case.

When plaintiff anchored his trailer on the ramp preparatory to unloading, plaintiff said it was at a 45° angle. He testified that the angle of the trailer, the fact that "the cartons were the type that they were" and the fact that the load might have been disturbed, caused the cartons to shift and fall. The ramp was 53 feet long and $9\frac{1}{2}$ feet deep. It did not, therefore have an incline of 45° but of ^{less than} 20° . If plaintiff took cognizance



of the law of gravity he, knew, as a reasonable man, that the cartons in this trailer might shift and fall. His statements and conduct disclose that he did know that and being aware of the obvious, visable danger and having knowingly exposed himself to that danger he cannot recover in this proceeding.

In Blomberg vs. Trupukka, 210 Minn. 523, 299 N.W. 11, it appeared that the plaintiff was a customer at defendant's lumber yard. He volunteered to hold some galvanized metal siding on edge in equilibrium, while other siding was being loaded on a truck. When the metal siding he was steadying got out of balance it fell upon him and he sustained injuries for which he sought to recover. In the lower court there was a verdict for the plaintiff which the trial court set aside and rendered judgment for the defendant notwithstanding the verdict. In affirming this judgment the Supreme Court of Minnesota said: "It is clear that the pile was in equilibrium when plaintiff took hold. There was no risk of danger to him so long as he maintained the pile in that position. There was danger to him if he permitted it to get off balance, which he did. Plaintiff's argument is that there was a duty to warn that the pile would fall if it got out of equilibrium since it was heavy and apt to fall when out of equilibrium, and that failure to warn was negligence.-----An act which exposes another to risk of injury only by his failure to conform to those rules of conduct for his own safety with which he might reasonably be expected to comply does not violate the standards of due care. A party has a right to assume that others will observe as a minimum the operation of well-known natural laws. Prosser, Torts, pp. 232-234. The operation of the law of gravity is a matter of such common knowledge that all persons of ordinary intelligence and judgment, even if they are illiterate, are required



to take notice of it. *Olson vs. McMullen*, 34 Minn. 94, 24 N.W. 318. As to such matters there is no duty to warn for the simple reason that the purpose of a warning is to supply a party with information which he is presumed not to have. There is no necessity to warn against the obvious. The rule is most commonly applied in master and servant cases, where, although the duty of the master to warn and instruct the servant is nondelegable, it is universally held that the master owes no duty to warn or instruct his servants of dangers obvious to a person of ordinary intelligence and judgment. Our cases are collected in 4 Dunnell, Minn. Dig. (2d Ed. & Supps.) 5932. The lack of danger to a person holding the pile upright in equilibrium and the danger of its falling if permitted to get out of equilibrium were so obvious that no warning was necessary. The operation of the law of gravity would cause the pile to fall, if plaintiff permitted it to get out of equilibrium. In *Tomczek vs. Johnson* 110 Minn. 320, 125 N.W. 268, 269, we held that the master owed no duty to a common laborer in a quarry to warn him that a large granite rock which was placed on its narrow side or edge so that 'its equilibrium was unstable' would fall if its equilibrium were disturbed, since every person is supposed to take note of the law of gravity. Likewise, in *McCutcheon vs. Virginia & R.L. Co.*, 114 Minn. 226, 130 N.W. 1023, we held that there was no duty to warn that a load of lumber on a truck operated on a tramway in a lumberyard would shift toward and against the plaintiff, standing at the side of the truck near the rear, if the front end of the truck were raised. In *Manley vs. Minneapolis Paint Co.*, 76 Minn. 169, 78 N.W. 1050, the master was held to be under no duty to warn a 24 year old employee of the dangers incident to unloading from a car to a platform barrels weighing 400 pounds. In *Boyer vs. Eastern Ry. Co.*, 87 Minn. 367, 92 N.W. 326, the



master was held not to be negligent for failure to warn of the dangers incident to unloading logs from a flatcar. Of course there is a duty to warn against extraordinary and hidden dangers such as the fact that a top-heavy machine balanced by a detachable part will topple over if the part is removed. Peterson vs. American Grass Twine Co., 90 Minn. 343, 96 N.W. 913".

Counsel for appellee, in commenting upon Blomberg vs. Trupkka, supra, says that the danger was obvious in the Blomberg case and not in the instant case and that the cases have no factual similarity. The evidence in this record discloses that plaintiff recognized the danger of unloading his cargo in the manner he did. The cartons shifted just as he anticipated. The danger was obvious to him. He, just as the plaintiff in the Blomberg case, was required to take notice of the operation of the law of gravity. It was not incumbent on defendant to give plaintiff a warning of any kind but if it was, as the Minnesota Court said, there was no necessity to warn against the obvious because the purpose of a warning is to supply a party with information which he is presumed not to have.

In the instant case it was plaintiff's affirmative act that placed his trailer in the ramp, inclined at the angle it was. It was the plaintiff, who opened the doors and observed the cartons which fell out ^{and} went inside and unloaded the cartons. The danger was obvious and he assumed it and must be held as a matter of law, guilty of contributory negligence. Furthermore, the record discloses no act of negligence on the part of the defendant which proximately caused plaintiff's injuries.

For the reasons stated the trial court erred in not sustaining defendant's post-trial motion for judgment notwithstanding the verdict. The judgment appealed from is therefore reversed.

SMITH, J. CONCURS.

Judgment Reversed.

McNEAL J. CONCURS.



the wrongful death action but wrongfully refused to do so and after such

Publ. in Full

General No. 11481

Agenda No. 2

IN THE

1st DIVISION

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

May Term, A.D. 1961

34 I.A. 2269

GEORGE H. GOULD,
PLAINTIFF-APPELLEE,

vs.

COUNTRY MUTUAL CASUALTY
COMPANY, an Illinois Corporation,
DEFENDANT-APPELLANT.

Appeal from the
Circuit Court of
Kane County.

DOVE, P.J.

Country Mutual Casualty Company issued to George H. Gould, a member of the Kane County Farm Bureau, a policy of insurance designated as "Farmers General and Employers Liability Policy". This policy became effective on January 21, 1948 and it was in full force during the entire month of June, 1953. By its provisions the liability of the company for loss on account of an accident resulting in death to one person was limited to \$10,000.00. Its insuring agreements were designated as coverages, A,B,C and D and by these provisions the company became obligated to pay the insured "all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, on account of accidental bodily injuries, including death at any time resulting therefrom, suffered or alleged to have been suffered by any person or persons not employed by the insured, by reason of the insured's negligence, including liability arising from the ownership, maintenance, or use of any farm implement or any farm tractor not subject to motor vehicle registration".

the wrongful death action but wrongfully refused to do so and after such

Following Coverage D of the insuring agreement under the heading, "Defense and Expense", appears the following: "The company agrees with respect to insurance afforded by this policy under coverages A, B, and C, to defend, in the name of and on behalf of the insured, any suits, even if groundless, brought against the insured to recover damages, and to pay, irrespective of the limits of liability, all costs taxed against the insured in any legal proceeding defended by the company, all interest accruing after entry of judgment upon such part thereof as shall not exceed said limits of liability, and all expenses incurred by the company in its investigations, and the adjustment of any claim, or the defense of any suit resulting therefrom". Under the heading "General Exclusions", it was stated that the policy did not cover any "damage, loss, liability or obligation arising out of any criminal, wilful, deliberate or malicious act".

On October 24, 1958 in the Circuit Court of Kane County George H. Gould filed the instant complaint by which he demanded judgment against Country Mutual Casualty Company for \$11,500.00. The defendant answered the complaint and filed its demand for a jury trial and also filed affirmative defenses hereinafter referred to. The plaintiff filed his motion to strike the affirmative defenses and for a summary judgment in his favor. In opposition to this motion for a summary judgment, defendant filed counter affidavits and a motion for summary judgment in its favor. Following a hearing, the trial court entered an order striking defendant's affirmative defenses, denying defendant's motion for judgment, sustaining plaintiff's motion and entered a summary judgment in favor of the plaintiff and against the defendant for \$11,500.00, this amount includes an attorney fee of \$2500.00. To reverse this judgment defendant appeals.

the wrongful death action but wrongfully refused to do so and after such

The instant complaint, alleged the issuance of the insurance policy and averred that the plaintiff on the night of June 20, 1953 heard a disturbance in and about his farm; that he was aware that livestock and other personal property had been stolen from him and others in his community; ^{that he} fired a shot and the pellets from the gun which he fired, hit and killed William Sandell, sixteen years of age. The complaint then alleged that plaintiff immediately notified the defendant of the facts concerning this accident and requested defendant to furnish legal counsel for him in the legal proceedings to follow but defendant did then, and later, refuse to provide legal counsel.

The complaint then alleged that on February 18, 1954, the administrator of the estate of William Sandell brought a wrongful death action against Gould; that the wrongful death action complaint alleged, among other things, that plaintiff herein negligently, carelessly and improperly discharged a gun, as a result of which, Sandell sustained wounds from which he died on June 21, 1953; that the complaint in the wrongful death action also charged that Gould wilfully, intentionally and maliciously assaulted Sandell by discharging a gun at him and as a result thereof Sandell sustained divers wounds from which he died on June 21, 1953.

It was then alleged, in the instant complaint, that after defendant had refused to provide legal counsel, he, Gould, employed counsel of his own choosing who filed an answer in the wrongful death action and that by his answer, he denied the allegations of the complaint. The complaint then averred that the issues made by the pleadings in the wrongful death action were submitted to the court for determination and culminated in a judgment in favor of the plaintiff and against defendant, Gould, in the sum

the wrongful death action but wrongfully refused to do so and after such

of \$9,000.00. It was then averred that Gould paid this judgment and in addition thereto, became obligated to pay his attorney fees amounting to \$2,500.00. Attached to the complaint and made a part thereof was, (a) a copy of the insurance policy issued to Gould by defendant; (b) a copy of the complaint in the wrongful death case; (c) a copy of the judgment order in favor of the administrator and against Gould for \$9000.00 and (d) a copy of an instrument showing a satisfaction of this judgment.

The judgment order in the wrongful death action, a copy of which was attached to the complaint found that Sandell, at the time he was killed, on the night of June 20, 1953, was in the exercise of due care and caution for his own safety and that defendant, Gould, was guilty of the negligence charged in count one of the amended complaint but was not guilty of a wilful, intentional and malicious assault on Sandell or guilty of wanton misconduct as charged in counts two and three of the amended complaint in the wrongful death action.

The defendant in its answer to the instant complaint admitted the issuance of the policy of insurance and the coverage therein provided as alleged, but denied that it agreed to defend any suits, even though groundless, brought against the plaintiff in the name of and on behalf of the plaintiff. The answer averred that there was no coverage afforded the plaintiff in connection with Sandell's death, under the exclusion clauses contained in the policy. The answer made no reference to the allegations of the complaint with reference to the employment of counsel by Gould to defend him in the wrongful death case except to state that defendant had no knowledge, sufficient to form a belief, with reference to the allegations of the amended complaint to the effect that Gould had become legally obligated to pay his attorney \$2500.00 as his attorney fees in connection with the defense of the wrongful death action.

the wrongful death action but wrongfully refused to do so and after such

As affirmative defenses the answer set up: (a) the exclusion provision which provided: "This policy does not cover damage, loss, liability or obligation arising out of any criminal, wilful, deliberate or malicious act", and, (b) that Gould was convicted of the criminal act of manslaughter in the Kane County Circuit Court in connection with the death of said William Allen Sandell.

As an alternative further affirmative defense defendant alleged that on or about June 20, 1953, plaintiff Gould, wilfully, deliberately and maliciously fired a shot gun in the direction of William Allen Sandell and averred that Gould knew, or should have known, "that as a result of such action on his part, said William Allen Sandell might or could be killed, and that, in fact, said William Allen Sandell was killed because of said action on the part of the plaintiff". Attached to the answer and made a part thereof were copies of: (a) the indictment in the criminal case; (b) the verdict of the jury finding Gould guilty of manslaughter; (c) the judgment order of conviction, and (d) the sentence imposed on Gould. As stated, the trial court denied defendant's motion for judgment on the pleadings, sustained plaintiff's motion, and rendered judgment against the defendant for \$11,500.00.

To sustain the judgment of the trial court appellee insists that the insurance policy issued by appellant to him provided that when he paid the administrator of the estate of William A. Sandell the amount of the judgment the administrator recovered on account of the death of his intestate, because of the negligence of the insured, that then, under the provisions of the policy of insurance, appellant was obligated to pay appellee the amount of said judgment; that it was specifically determined in the wrongful death action, that Sandell's death was occasioned by accidental injuries sustained by reason of insured's negligence; that appellant, under the provisions of its policy, was obligated to defend

the wrongful death action but wrongfully refused to do so and after such refusal, appellee was obliged to retain counsel and defend the action and by so doing incurred an additional \$2500.00 obligation for attorney fees. Counsel insists, that the pleadings and affidavits presented no triable issue of fact and that appellee's motion for summary judgment was properly granted by the trial court.

Counsel for appellant insist that the pleadings disclose that the policy upon which the instant action is founded, expressly provided that it did not cover any damage, loss, liability or obligation arising out of any criminal act of the insured; that the death of William A. Sandell was the result of the insured's criminal act and therefore appellant was under no obligation of any kind or character under the provisions of the policy. It is further insisted that the insured's prior conviction of manslaughter in connection with the death of Sandell is conclusive evidence that plaintiff is not entitled to recover in this action and it is also insisted, that appellant, not being liable under the policy was not required to undertake the defense of Gould in the wrongful death action, was justified in refusing to do so and not being liable, the trial court erred in not sustaining defendant's motion for a summary judgment in its favor. Counsel contend that inasmuch as it was not a party to the wrongful death action, it cannot be bound by that judgment and insist that, if it is not entitled to a summary judgment, that then, whether the death of Sandell arose out of a criminal act of appellee or was occasioned by insured's negligence is a question of fact presented by the pleadings and to determine that issue, it is entitled to a jury trial.

The determinative questions presented by this record are:

- (1) Is appellant, the insurer, conclusively bound, in this proceeding, by the finding and judgment in the proceeding brought against Gould, the insured, in the wrongful death action wherein the administrator of the estate of William A. Sandell was the sole plaintiff and George H. Gould was sole defendant? The trial court held it was.
- (2) Is the record and judgment of Gould's conviction of manslaughter competent evidence and admissible for any purpose upon a trial of this case? The trial court held it was not. If, it should be held that such record and judgment of conviction are admissible in evidence the question would then arise whether such record and judgment are conclusive of the fact that

Sandell lost his life as a result of a criminal act of the insured, Gould, or is such record and judgment only prima facie proof that Sandell lost his life as a result of a criminal act committed by the insured?

Counsel for both parties recognize that the authorities in other jurisdictions are in conflict with reference to the admission of evidence, in a subsequent civil action of a prior conviction of one of the parties of a crime, arising out of the same transaction or occurrence. Some courts admit such evidence against the party convicted as conclusive evidence of the issues decided in the criminal proceeding. Other courts exclude such evidence entirely while in other jurisdictions such evidence is admitted against the party convicted, as prima facie evidence of the issues decided. Counsel for appellee insist, however, that in this state the record of the conviction of appellee for a criminal offense presented no defense to the instant action.

Corbley vs. Wilson, 71 Ill. 209 was an action brought by Wilson against Corbley for slander. The defense interposed was that the spoken words were true. The alleged slanderous words charged the defendant with a crime and upon the trial of the slander action, the plaintiff offered and the court admitted, in evidence, the record of his acquittal of the criminal charge. In reversing the judgment for the plaintiff, the Supreme Court said that the verdict and judgment in the criminal prosecution had no place in the civil cause for any purpose.

In McCottrell vs. Benson 32 Ill. App. 2d, 367, 178 N.E. 2d 144, ^{criminal} it was said that the record of conviction of the plaintiff in a civil action of an assault, is not admissible in evidence in a later civil action based upon the same assault.

In Cammarano vs. Gimino, 234 Ill. App. 556, the court held that evidence of defendant's conviction in a prior criminal action for the same assault was not admissible in evidence in a subsequent civil action.

In a majority of the other jurisdictions the authorities are to the same effect. In *Washington National Insurance Company vs. Clement*, 192 Ark. 371, 91 SW. 2d 265, 130 A.L.R. 694, it was held that the conviction of one for driving his car while intoxicated, at the time of receiving certain injuries in an accident, did not conclude such person from recovering for disabilities sustained in the accident upon an insurance policy specifically excepting, from the risk, any injuries sustained by the insured while violating the law. The court held that such judgment of conviction was not evidence in the subsequent civil action to establish the truth of the facts on which it was rendered.

Interstate Dry Goods Stores vs. Williamson, 91 W. Va. 156, 112 S.E. 301, 31 A.L.R. 258, was an action brought to recover the value of certain goods which, it was alleged, had been stolen by the defendant, when plaintiff's warehouse was burglarized. Following the burglary, defendant was indicted, plead not guilty, was tried, convicted and sentenced to the penitentiary. Upon the trial of the civil case, the plaintiff offered in evidence the record of the conviction of the defendant of the burglary, proof that the defendant was the same party as the defendant in the criminal action who was convicted, and evidence of the value of the stolen goods. No evidence was offered showing, or tending to show, that the defendant committed the burglary except the judgment of conviction. The circuit court directed a verdict for the defendant and the plaintiff appealed. The West Virginia Supreme Court of Appeals in affirming the judgment of the trial court stated that the sole question presented for determination was: "can the record of a judgment rendered in a criminal trial be used as evidence in a civil suit to prove the facts which were necessarily determined by it in the criminal case?" In answering this question the court said that had the judgment been rendered on a plea of guilty the record of that plea could be introduced not as conclusive evidence, against

the defendant, but as an admission on his part. "It is uniformly held", continued the opinion, "that a judgment of conviction or acquittal in a criminal case is not proper evidence in a civil case to establish the facts which were necessary to be established in order to secure such conviction or acquittal".

Following the report of this cause in 31 A.L.R. 258, beginning on page 261 is an annotation on: "Conviction or acquittal as evidence of facts on which it was based, in a civil action". The author of the annotation states that the rule, supported by the great weight of authority is to the effect that a judgment of conviction or acquittal rendered in a criminal prosecution cannot be given in evidence in a purely civil action, to establish the truth of the facts on which it was rendered. Supplemental annotations appearing in 57 A.L.R. 504, 80 A.L.R. 1145 and 130 A.L.R. 694 are superseded by a later one in 18 A.L.R. 2d, 1287. It is there stated (18 A.L.R. 2d, 1289) that a large number of courts continued to apply the rule excluding a previous conviction offered, in a civil action, as evidence of the facts upon which it was based. "However," continues the annotator, "an increasing number of decisions have approved the admission of such evidence, reasoning that the safeguards afforded the accused under criminal procedure are greater than those in a civil action, so that he has no cause for complaint that an adverse decision arrived at under such restraints should be used against him, especially where it is admitted, only, as prima facie evidence, subject to rebuttal." At page 1315 of this same annotation, it is said that there are stronger arguments for excluding in a civil action, proof of a prior acquittal than in cases of a prior conviction, since a judgment of conviction is a positive finding, indicating that the state has successfully borne the extraordinary burden of proving the relevant facts beyond a reasonable doubt, whereas the acquittal, does not purport to be a judgment of innocence but is merely a negative statement that the proof necessary for a conviction was not forthcoming.

Illustrative of the cases, cited and relied upon by appellant and which hold that the record and judgment of conviction of a criminal offense is admissible as material and relevant to the issues in a subsequent civil action are Eagle Star and British Dominions Ins. Co. vs. Heller, 149 Va. 82, 140 S.E. 314, Schindler vs. Royal Ins. Co., 258 N.Y. 310, 179 N.E. 711, 80 A.L.R. 1142, Fidelity-Phenix Fire Ins. Co. vs. Murphy, 226 Ala. 226, 146 So. 387 and North River Ins. Co. vs. Militello, 100 Colo. 343, 67 P. 2d 625, Wolff vs. Employers Fire Ins. Co. 282 Ky. 824, 140 S.W. 2d, 640, 130 A.L.R. 682.

Eagle Star and British Dominions Ins. Co. vs. Heller, 149 Va. 82, 140 S.E. 317 was an action by Max Heller to recover under a fire insurance policy, upon a stock of goods, after he had been convicted of wilfully burning the same with intent to injure the insurer. The trial court refused to admit in evidence the record of conviction holding that such evidence was irrelevant and immaterial. The Supreme Court of Appeals of Virginia reversed this judgment and cited and commented upon many cases. The court in the course of its opinion said that to sustain the judgment of the trial court would be, in effect, insuring the plaintiff against the consequences of violating the Virginia Statute which made it a felony to wilfully burn any building or goods or chattels which, at the time, are insured against loss or damage by fire with intent to injure the insurer. "To permit a recovery under a policy of fire insurance", continued the court, "by one who has been convicted of burning the property insured would be to disregard the contract, be illogical, would discredit the administration of justice, defy public policy and shock the most enlightened conscience. To sustain such a judgment would be to encourage and give support to the current thoughtless and carping criticisms of legal procedure, and to justify the gibe that the administration of the law is the only remaining legalized lottery.

Our conclusion then, under the facts of this case, is that the court erred in refusing to admit evidence of the conviction; that when admitted the precise finding of fact, that the accused was criminally responsible for the fire, unquestionably incendiary, which destroyed his goods, is conclusive upon the plaintiff, Heller; that this judgment of a court of competent jurisdiction was a determination of that particular and decisive fact as against him; that this judgment cannot be attacked except upon the ground of fraud, perjury, collusion or some other such ground of invalidity, and that when so admitted in evidence there could have been but one proper verdict and that a verdict for the defendant. We shall therefore, reverse the judgment in favor of the plaintiff and enter judgment here for the defendant."

Schindler vs. Royal Insurance Co. 258 N.Y. 310, 179 N.E. 711, 80 A.L.R. 1142, was an action brought to recover under an insurance policy for a fire loss. The defense interposed was that plaintiff had been convicted in the County Court of Nassau County of the crime of presenting to defendant a false and fraudulent proof of loss and that such judgment of conviction was a bar to the maintenance of this action. The court stated that from an early day the rule in New York permits proof of the conviction of a criminal offense as prima facie evidence of the facts involved, but that a judgment of conviction or acquittal is not decisive of the facts on which it is based. The court then cited and quoted from an English case, (Matter of Crippen's Estate, L.R. (1911 Prob. 108, 115) where it is said: "In my opinion, where a convicted felon, or the personal representative of a convicted murderer who has been executed, brings any civil proceeding to establish claims or to enforce rights, which results to the felon, or to the convicted testator from his own crime, the conviction is admissible in evidence, not merely as proof of the conviction, but also as presumptive proof of the commission of the crime.-----It would be an unedifying

spectacle if the courts should not apply the strict rule which excluded all reference to the judgment of conviction in the civil action as evidence tending to establish the material facts. We shall, however, continue to hold that it is not effective as a plea in bar".

In *Fidelity-Phenix Fire Ins. Co. vs. Murphy*, 226 Ala. 226, 146 So. 387, the Supreme Court of Alabama quoted extensively and approvingly from the *Schindler* case, *supra*, adopted its reasoning, and held that evidence of the conviction of a crime which created the liability for which plaintiff seeks indemnity from an insurance company is admissible as a circumstance tending to show the commission of such crime.

North River Ins. Co. vs. Militello, 100 Colo, 343, 67 P. 2d, 625, was an action brought to recover on a fire insurance policy which covered an apartment house owned by the plaintiff and which had been destroyed by a fire and an explosion. Prior to the trial of this cause the plaintiff was convicted of the crime of burning the property with intent to defraud the insurance company and sentenced to the penitentiary. Upon the trial of the civil case the record of conviction was admitted in evidence limited to impeaching the credibility of the plaintiff. The plaintiff recovered a judgment for the full amount of the policy and the defendant appealed. In reversing the judgment of the trial court and remanding the cause for a new trial the supreme court of Colorado said: "On the question of the **or inadmissibility** admissibility/of the evidence of a criminal conviction in a civil proceeding and the limitations, if any, to be placed thereon, this court has not committed itself, and we now are free to adopt the rule which seems most logical and in accord with public policy. There is **precedent** ~~authority~~ for both extremes;

that is, that it is inadmissible for any purpose, and contra, that it is admissible and conclusive as to the fact proven. We embrace neither rule. Logic compels a relaxation of the long followed earlier rule of complete exclusion, but we are not ready to announce that all convictions are to be conclusive evidence for the purpose of establishing a material fact, even though such fact was the basis of the conviction. It would be more definitely a legislative function to declare such a public policy, however, an enlightened conscience does not permit us to cling to the archaic rule of exclusion for all purposes when such a fact has been solemnly and judicially determined. Greater weight is to be given to this conclusion when the fact of guilt is established beyond a reasonable doubt in a trial in which the accused is surrounded by all of the safeguards afforded by law. The plaintiff, defendant in the criminal action, was convicted of defrauding the insurance company by the identical act resulting in the loss upon which he now predicates his claim for recovery against the same company. We are not in sympathy with any rule of law which would permit him to profit by his own wrong. The record of conviction in the criminal case was admissible in evidence in this case, and when so admitted, carried proof of the conviction and is to be considered as prima facie evidence of the fact that plaintiff destroyed or caused to be destroyed the property for which he now seeks to recover judgment in the amount of the insurance thereon. It is such presumptive proof, as to shift the burden to him, to establish his innocence thereof".

In this jurisdiction the law is that ^{a judgment} in a criminal case based upon a plea of not guilty cannot be given in evidence in a subsequent civil action to establish the facts on which it was rendered. Upon a plea of guilty a record of such judgment is admissible in a subsequent civil action against

the defendant in the criminal case, not conclusive of the issues in the civil case, but as a judicial admission, subject to explanation and contradictions, and to be weighed and considered by the jury in connection with all the other evidence in the case. (Young vs. Copple, 52 Ill. App. ⁵⁴⁷ ~~204~~ Schreiner vs. High Court of Illinois Catholic Order of Forresters, 35 Ill. App. 576.)

In the instant action the allegations of the affirmative defense which the trial court struck disclosed that the plaintiff seeks to recover under a policy of insurance which explicitly stated that it did not provide any coverage for any damage to the insured arising out of any criminal act; that previous to the time the instant complaint was filed plaintiff was indicted for the crime of manslaughter in connection with the death of William Allen Sandell; that he plead not guilty to the commission of that offense; that the issues made by the charge and plea were submitted to a jury and he was found guilty of manslaughter; that judgment was rendered upon that verdict, sentence was imposed and defendant was imprisoned in the penitentiary. By the policy of insurance, which forms the basis of this action, the insurer became liable to pay the insured, the amount specified in the policy, on account of the accidental death of anyone, but its policy did not provide any coverage to the insured which arose out of any criminal act by the insured. The plaintiff in this action was the defendant in the criminal action. He was convicted of unlawfully killing William Allen Sandell, an act which must have been accidental and not criminal, if defendant was obligated under the provisions of its policy contract.

Under the authorities relied upon by appellant, which are quite persuasive, the record of appellee's conviction was either conclusive, or prima facie, proof of the fact that William Allen Sandell lost his life as a result of a criminal act on the part of the insured. The authorities herein referred to, and many others, from this and other jurisdictions, hold otherwise. The trial court, therefore did not err in striking this affirmative defense.

Whether appellant is conclusively bound, in this proceeding, by the finding and judgment in the action brought against the insured in the wrongful death action, wherein appellee was defendant and the administrator of the Estate of William Allen Sandell was plaintiff, remains to be considered.

Under the heading "Insurance Agreements", the policy issued by appellant to appellee contains the following provision:

"Defense and Expense. (

The company agrees with respect to insurance afforded by this policy under coverages A, B, and C to defend, in the name of and on behalf of the insured; any suits, even if groundless, brought against the insured to recover damages, and to pay, irrespective of the limits of liability, all costs taxed against the insured in any legal proceeding defended by the company, all interest accruing after entry of judgment upon such part thereof as shall not exceed said limits of liability, and all expense made by the company in its investigations and the adjustment of any claim, or the defense of any suit resulting therefrom".

Where an insurance company, responsible under a liability policy to the insured for whatever might be recovered in an action against such insured, has notice of an action against the insured with respect to a liability covered by the policy and is given an opportunity to appear and defend, the judgment rendered in the action, if obtained without fraud, will be conclusive on the company, whether or not the company appeared and whether the company did or did not participate in the defense of the action, and such a judgment is conclusive on the insurer as to all questions determined therein which are material to a recovery against it in an action on the policy. The judgment is not conclusive, however, as to matters which were not tried or determined in the former action, such as the question whether the loss was within the coverage of the policy.

(22 I.L.P. Insurance, sec. 524, pp. 568-569.) In support of this text the

author cites Lachenmyer vs. Central Mutual Ins. Co., 284 Ill. App. 391, 2 N.E. 2d 177; Snyder vs. U.S. Mutual Ins. Co., 312 Ill. App. 337, 38 N.E. 2d 540; Wold vs. Glens Falls Indemnity Co., 269 Ill. App. 407 and Welborn vs. Ill. Nat. Casualty Co., 347 Ill. App. 65, 106 N.E. 2d 142.

In Wold vs. Glens Falls Indemnity Co., 269 Ill. App. 407 it appeared that the defendant, Indemnity Company, issued an insurance policy to Arthur E. Wold, by the provisions of which the company agreed to pay all sums which the insured shall become liable to pay by reason of the negligent operation of his described motor truck. On May 31, 1929, the insured, while operating a truck, ran into Warren Wegener who died as the result of the injuries he received. The insurer was duly notified and in June, 1929, ^{it} notified the insured that the policy did not cover the accident in question because the insured was doing general hauling at the time of the accident in violation of the conditions of the policy. Thereafter in a wrongful death action brought by the administrator of Warren Wegener against Wold, the administrator recovered a judgment and that judgment, not having been paid, garnishment proceedings were instituted in the name of Wold, for the use of the Administrator of the Estate of Warren G. Wegener, against Glen Falls Indemnity Company. The pleadings consisted of an affidavit and interrogatories. In its amended answer the insurance company denied that it was indebted to Wold but admitted that it issued the policy of insurance wherein it agreed to indemnify Wold against liability for damages arising out of the use of the motor truck described therein and upon the terms and conditions contained in the policy. Its answer then alleged that at the time of the accident the truck was being used by Wold for purposes in violation of the conditions of the policy. The trial was before the court, without a jury, resulting in a judgment in favor of the plaintiff and against the garnishee for \$10,583.33. The Indemnity Company appealed.

The Appellate Court, affirmed the judgment of the trial court and stated that the Indemnity Company had notice of the accident and of the wrongful death action against the assured and upon investigation denied liability and did not participate in the trial of the wrongful death action; that in a garnishment proceeding the trial court was obliged to determine what, if anything, was due Wold from the Indemnity Company under the terms of its contract; that the contract of indemnity was against loss by casualty and was absolute upon happening of the loss, provided there was no breach by the insured of the conditions of the policy. The opinion continued: (pp. 412-413) "The garnishee repudiated its obligation by its failure to appear and take part in the defense of Wold in the original proceedings, and it is not now in a position to question the result of that action. The beneficial plaintiff had a right to have the question of the indebtedness determined, and the amount found due from the garnishee applied to the payment of the judgment, not because of any privity between the plaintiff and the garnishee defendant, but because of the right of the judgment creditor to have money due from the garnishee under the terms of the insurance contract existing between the parties, applied to the payment of the judgment. Kinnan vs. Hurst Co., 317 Ill. 251. Under the facts and circumstances in the instant case the amount that may be due from the insurance company to the assured is subject to garnishment proceedings, although the liability is disputed". The court then went on to say, (pp. 414-415): "The rule in this state is that a judgment creditor, by garnishment proceedings, may recover only such indebtedness as his debtor might recover in an action of debt or in an action of assumpsit against the defendant, Glen Falls Indemnity Company, and the rule is no different where the indebtedness is denied by the garnishee as in the instant case. The burden to establish such liability is

upon the plaintiff. In the instant case the beneficial plaintiff recovered a judgment against Arthur E. Wold, and the question arises, is the garnishee indebted to the judgment debtor upon a policy of insurance? In the action before us the garnishee denied that it was indebted to the judgment debtor, which indebtedness, if established, is to be applied in payment of the judgment". The court held in this case that, the insurance carrier, in the garnishment proceeding, was in no position to question the result of the wrongful death action, it having repudiated its obligation to appear and take part in the defense of the insured in that case. The court stated, however, that the liability of the insurance company to the insured must be measured by the terms of the policy and that the judgment creditor could only recover the amount his judgment debtor might have recovered against the insurance company.

In Drennan vs. Bunn, 124 Ill. 175 it appeared that Thomas J. Bunn sold to Frank P. Drennan two promissory notes executed by R.C. Huskey and Eva J. Huskey, Bunn endorsed these notes without recourse, and delivered them, together with the trust deed, which had been given to secure their payment, to Drennan. Thereafter Drennan filed two suits against R.C. Huskey and Eva J. Huskey. One was an ejectment action to recover possession of the land and the other was a foreclosure proceeding. The defense of usury was interposed in both suits. Huskey paid \$671.00, admittedly due, after deduction of all interest that had been paid, and the ejectment suit was dismissed. The foreclosure suit was prosecuted to a final decree, which dismissed the complaint, the court finding that the notes were usurious and that all interest had been forfeited and that, after deducting the interest that had been paid and the sum Drennan had received from Huskey, all that was due on the notes had been paid. Thereupon Drennan sued Bunn to recover the difference between the amount Drennan actually received on the notes and the amount due thereon at the time he purchased them. In the Circuit Court judgment was rendered for the defendant and the Appellate Court affirmed. Upon further appeal, the Supreme Court reversed the judgments

of the Circuit and Appellate Courts and in the course of its opinion stated that two questions arose on the record. First, is the vendor of negotiable notes, in the absence of express representation, and who assigns them without recourse, liable on an implied warranty, for any deficiency between the amount apparently due upon the face of the instrument and the amount legally collectible upon it? Second, if liable, is the vendor concluded by the judgment between his vendee and the payor of the instrument, by reason of having been notified, in apt time, of the pendency of the suit and of the defense of usury set up by the payor, although not expressly requested to take charge of the suit, and not notified that the vendee intends to hold him responsible for the result of the suit? The court answered both questions in the affirmative and in the course of its opinion said (p. 188): "Where one party is liable to indemnify another against a particular loss, it is because, by law or by contract, the primary liability for such loss is upon the party indemnifying, and in such instances the party bound to indemnify is in privity with the party to be indemnified, and he therefore has a direct interest in defeating any suit whereby there may be a recovery as to the subject matter of the indemnity, against the party to be indemnified. The party to be indemnified, moreover, is manifestly, directly interested in having him defeat all recovery in such suit, and so their respective interests and duties in respect of such suit must be the same".

^{supra}

The court in *Drennan vs. Bunn*, cited and quoted from various authorities among them *Littleton vs. Richardson*, 34 N.H. 179, where it is said: "When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency

of the suit, and requested to take upon himself the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he has appeared or not". The court then stated that in numerous other cases the general doctrine is asserted that notice to the party responsible over, imposed upon such party the duty of defending, and renders him liable for the result of the suit and held that the decree in the foreclosure proceeding was binding and conclusive against Bunn, he having had notice of that suit.

In *Butler vs. Continental Oil Co.*, 182 S.W. 2d, 843, the Court of Civil Appeals of Texas stated that it was the settled law of that and other states that, where a person who is responsible to another for whatever may be recovered in a suit either by operation of law or by express contract, has notice of a suit against the latter and has been given an opportunity to appear and defend, the judgment which is rendered in the action, if obtained without fraud, will be conclusive on him whether he appeared or not. In the course of its opinion the court said: "It is uniformly held that, in such a case, the person responsible over is no longer regarded as a stranger because he has had notice of the action, the right to appear and defend the action, and the same means of controverting the claim asserted as if he had been made a formal party to the record and that it would be unreasonable to permit him to contest the justice of the claim in the suit against himself, after having neglected or failed to show its injustice in the suit against the person to whom he is responsible over".

In *State Bank vs. American Surety Co.*, 288 N.W. 7, the Supreme Court of Minnesota said that a judgment recovered against an indemnitee upon an obligation covered by a contract of indemnity is conclusive against the indemnitor in an action by the indemnitee to recover indemnity, if the indemnitee gave the indemnitor notice of the pendency of the action in which the judgment was recovered and requested him to assume the defense. In the course of the opinion the court cited 2 Van Fleet, Former Adjudication, p. 1178, sec. 579 where it is said: "If the person sued gives due notice of the pendency of the suit to the one who is responsible over and requests him to assume the defense, all the cases agree that the latter will be concluded by the judgment rendered, if sued upon his obligation by the former".

"Where it is the duty of an automobile liability insurer to defend an action against the insured and the insurer erroneously or wrongfully refuses to do so on the ground that the claim upon which the action against the insured is based is not within the coverage of the policy, the insurer is guilty of a breach of the contract which renders it liable to the insured for all damages resulting to him as a result of such breach".

(5 A Am. Jur. Automobile Insurance, sec. 127). The obligations created by the insurer's refusal to defend are to pay the amount of the judgment rendered against the insured in the action brought against him by the injured party, and the expense the insured was put to by reason of making the defense himself, including his court costs, attorney fees and other reasonable expenses. (5A Am. Jur. Automobile Insurance, sec. 128).

In an annotation in 49 A.L.R. 2d 694, it is said (p. 711) that all the cases agree that where it is the insurer's duty to defend, and the insurer wrongfully refuses to do so on the ground that the claim upon which the action against the insured is based is not within the coverage of the policy, the insurer is guilty of a breach of contract which renders it liable to the insured for all damages resulting to him as a result of such

breach. On pages 717, 718 of this same annotation it is said that if an insurer unjustifiably fails to defend such an action against the insured on the ground that the claim upon which the action against the insured was based, is outside the coverage of the policy, and the insured thereupon undertakes the defense of the action, the insurer is liable for the amount of the judgment obtained in such action against the insured and the reasonable and necessary expenses which the insured has incurred in conducting the defense (p. 721). The term "reasonable and necessary expenses" includes reasonable attorney fees (p. 727), court costs taxed or incurred in the suit (p. 730), reasonable witness and stenographers fees (pp. 731, 732), and investigating expenses (p. 733). Among the Illinois cases cited are Kinnan vs. Charles B. Hurst Co., 317 Ill. 251, 148 N.E. 12; Lincoln Park Arms. Bldg. Corp. vs. U.S. Fidelity and Guaranty Co., 287 Ill. App. 520, 5 N.E. 2d 773; Oscar Heineman Corp. vs. Standard Surety and Casualty Co., 289 Ill. App. 358, 7 N.E. 2d 389; Coulter vs. American Employers Ins. Co., 333 Ill. App. 631, 78 N.E. 2d 131.

While the wrongful refusal of the insurer to conduct the defense of an action based upon a claim within the coverage of the policy/ the insurer is not exposed to a greater liability to the insured than the limit of the amount stated in the policy. The failure to defend, however, does expose the defendant to the additional liability for the cost and expense which plaintiff was put to by reason of defendant's breach of the contract and embraces reasonable attorney fees. (Manheimer Bros. vs. Kansas Casualty and Surety Co., 149 Minn. 482, 184 N.W. 189; Coulter vs. American Employers' Ins. Co. 333 Ill. App. 631, 641).

No issue is made in this case as to the issuance of the policy, the coverage therein provided or notice by the insured to his insurer or insured's request that the insurer undertake the defense of the wrongful death action. Appellant's contention here is simply that, under the provisions of the policy, it was not required to provide any defense for its insured and that it was justified in refusing to do so. The Civil Practice Act authorizes

the entry of a summary judgment in any proper case. The pleadings are not to be conclusive, if there are no disputed questions of fact except those ^{made} by the pleaders. Where plaintiff's affidavits are sufficient, entry of summary judgment is not prevented by reason of the fact that defendant has filed pleadings which, on their face, set up a good defense. The primary purpose of affidavits under summary judgment proceedings is to inform the court whether or not there is in fact an issue worthy of trial. If no such issue of fact is shown, summary judgment may be entered in the absence of a triable issue of fact. Harrell vs. Summers, 32 Ill. App. 2d, 358, 178 N.E. 2d 133.

What appeared from the pleadings, exhibits and affidavits and what the record in this case disclosed to the trial court at the time counsel for the respective parties moved for a summary judgment was that on January 21, 1948, defendant issued to plaintiff its insurance policy which contained its insuring agreement, coverages, ~~its expenses~~ ~~defense~~ and its exclusion provisions; that the copy of this policy, attached to the complaint is a true and correct copy of said policy; that this policy was in full force and effect on and after the month of June, 1953; that on June 20, 1953 William A. Sandell died as a result of injuries which he received when he was shot by the plaintiff; that thereafter plaintiff was indicted for the crime of manslaughter, plead not guilty, was convicted and sentenced to the penitentiary as a result of his shooting Sandell; that subsequently the administrator of Sandell's estate brought an action, against plaintiff to recover for the alleged wrongful death of Sandell; that defendant was notified of that action and requested to undertake its defense on behalf of the defendant in that proceeding, the plaintiff in the instant cause; that defendant refused, taking the position that, under the provisions of its policy, it was in no way obligated to the

plaintiff; that the insured then employed counsel and interposed a defense in the wrongful death action; that the wrongful death action culminated in a finding that plaintiff here, the defendant in the wrongful death action, was ^{not guilty of wilful or wanton misconduct but was} guilty of negligence in connection with the death of Sandell and a judgment was rendered in favor of the administration of Sandell's estate and against plaintiff here for \$9000.00; that plaintiff paid that judgment and became obligated to pay \$2500.00 to his attorney for his services in representing him in the wrongful death action; that \$2500.00 is the reasonable and customary fee for the services rendered by counsel representing plaintiff in the wrongful death action and there is no showing or contention that it is not.

The pleadings and affidavits in this record disclose no conflict as to the facts. The trial court and counsel for both parties recognized that the record presented no triable issue of fact and that the case was a proper one for the entry of a summary judgment. In our opinion, as indicated, the record of plaintiff's conviction of manslaughter in connection with the death of William A. Sandell presented no defense to the instant proceeding and under the authorities cited, defendant is bound, under the admitted facts disclosed by this record, by the judgment rendered in the wrongful death action.

With reference to including \$2500.00 attorney fees, the affidavit of counsel for appellee set forth facts which warranted the trial court in including this amount in the summary judgment. The counter-affidavit filed by counsel for appellant did not make any issue of the amount of attorney fees. What counsel said in this counter-affidavit was that he was a practicing attorney in Kane County, represented defendant and in this action had represented other insurance companies in matters

involving insurance litigation. Affiant averred that defendant company refused to defend Gould in the wrongful death action and has refused to reimburse Gould for the amount of the judgment rendered against him in that action because the claim of the plaintiff, Gould, came within the exclusions set forth in the policy of insurance. As to attorney fees, counsel's affidavit stated: "Section 155 of the Insurance Code of Illinois provides in part for the allowance of attorney fees in the event an insurance company refused vexatiously and without reasonable cause to pay a loss but further provides that the allowance thereof shall not exceed \$500.00; that there is no showing in this record that the refusal to pay the judgment and attorney fees claimed was done vexatiously or without reasonable cause and that the pleadings and affidavit show that the refusal was based on defendant's position that the act of the plaintiff was within the exclusions heretofore set forth".

The section of the Insurance Code relied upon by counsel for appellant has no application to the question of allowance of attorney fees in the instant case. That section applied where a judgment has been obtained which the insurer is required to pay but which it vexatiously and without reasonable cause refuses to pay. The instant action is brought to reimburse the insured for the amount of a judgment rendered against him which he paid and to recover attorney fees which the insured incurred in defending an action which, under the provisions of the insurance contract, issued by the insurer, the insurer was obligated to defend. Here the insurer repudiated its obligation by its refusal to take part in the defense of the wrongful death action and therefore is not now in a position to question the result of that action.

Appellant's refusal to defend the wrongful death action made it obligatory upon appellee to procure the services of an attorney and having done so, appellant is, under the provisions of its contract, obligated to reimburse appellee for such attorney fees. Insurer's counter-affidavit with reference to attorney fees neither questions the amount sought to be recovered nor challenges the propriety of allowing an attorney fee.

The provisions of this insurance policy are not doubtful or difficult of interpretation. The conclusion arrived at by the trial court is reasonable and supported by the authorities. Its action in rendering the judgment appealed from is sustained by the record and is affirmed.

Judgment affirmed.

McNEAL, J. CONCURS.

SMITH, J. CONCURS.

ABST.

CHICAGO BAR
ASSOCIATION
JUN 24 1957

34 I.A. 312

48568

| | | |
|------------------------------------|---|-----------------|
| LINCOLN DIXIE FREIGHT LINES, INC., |) | APPEAL FROM |
| |) | |
| Plaintiff-Appellant, |) | MUNICIPAL COURT |
| |) | |
| v. |) | |
| |) | OF CHICAGO |
| ARROW MOTOR TRANSIT, INC., |) | |
| |) | |
| Defendant-Appellee. |) | |

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Plaintiff sued to recover \$1,425 as a balance due on an agreed rental at \$75 per month for use of its realty for storage of defendant's equipment. The court entered judgment for \$150.

Plaintiff, appealing, asks that judgment be entered for \$1,425.

During August, 1957, Gus Dinovo, who was in a trucking partnership operating under the name of Arrow Motor Transit, Inc., with his two brothers, visited Vincent Leoni, president of plaintiff, and agreed to pay plaintiff \$75 a month to store trucking equipment on plaintiff's lot. Trucks were stored there until some time in December, 1959. During 1959 the Dinovo brothers formed a corporation under the name of Arrow Motor Transit, Inc., and became owners of all the shares of stock. The corporation assumed all the partnership assets and liabilities. Payments on the account were made to plaintiff in November, 1957, April, 1958, July, 1958, January, 1959 and September, 1959, in the aggregate amount of \$850. These payments were recorded in Arrow's books as "terminal expense," an account that embraced janitors, repairs and similar maintenance expenses in connection with trucking terminals. Arrow had terminals in Chicago and Fort Wayne. Arrow's books had no account payable to plaintiff as a creditor. Plaintiff had not

performed any work at any of Arrow's terminals.

During September, 1959, the Dinovo brothers sold all of their stock in defendant to Albert J. Wilkins. Prior to the sale of the stock Gus Dinovo gave Wilkins a list of accounts payable. This list did not show plaintiff as a creditor. The list referred to a sum of \$686.50 as an "unlocated difference" and noted that this item was to create "a cushion to cover any unrecorded liabilities." Prior to the consummation of the stock sale Wilkins also received from the Dinovo brothers a profit and loss statement of Arrow. Both of the statements were drawn by certified public accountants. Neither listed plaintiff as a creditor or showed any amount due to it.

Plaintiff sent monthly statements for the rental to Arrow. Mr. Wilkins did not find any of the statements in the records of Arrow. Gus Dinovo did not know whether the statements were received by Arrow. When plaintiff asked for the balance of the arrearage in rent Wilkins sent Gus Dinovo to contact plaintiff in order to ascertain the reason for the request. After conferring with plaintiff's president, Gus Dinovo advised Wilkins that plaintiff would settle its claim for \$750. Wilkins stated he saw no reason for settlement since defendant was using its own property for storage of its equipment. Wilkins then inquired of defendant's dispatcher and learned that defendant had been using plaintiff's lot "on occasion." The dispatcher thought that this was not because of any financial arrangement but because of friendship between the Dinovos and the president of plaintiff. The following month defendant had its trucks removed from

plaintiff's property. Vincent Leoni, president of plaintiff, had been a business friend of Gus Dinovo for 15 years, but not a social friend. At the trial Leoni and Gus Dinovo testified for plaintiff. Albert J. Wilkins and Vincent Kramer, an accountant, testified for defendant. The opinion of the trial judge was that plaintiff had failed to prove a contract between it and defendant; that any agreement was between plaintiff and Gus Dinovo; that this agreement was not binding on defendant; that the court could not believe Dinovo under oath; that the latter was a friend of Leoni; that any money due plaintiff should be collected from Dinovo; that subsequent to the time Wilkins purchased the stock certain vehicles of defendant were occasionally stored on plaintiff's lot; and that defendant continued this use for two months after being informed thereof, and should pay \$150 as rental at \$75 per month for the use of plaintiff's lot for two months.

Plaintiff's theory is that the finding that it was entitled to only two months of the rental claimed is against the manifest weight of the evidence. Defendant argues that the record does not tend to support plaintiff's claim and that the testimony of Gus Dinovo is worthless. The general rule is that positive testimony of a witness uncontradicted and unimpeached cannot be disregarded. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his testimony even in the absence of any direct conflicting testimony. But neither court nor jury can through mere caprice disregard the testimony of an unimpeached witness. *People v. Davis*, 269 Ill. 256; *Stephens v. Hoffman*, 257 Ill. 497; *People v.*

Ahrling, 279 Ill. 70; Kuehne v. Malach, 286 Ill. 120.

Plaintiff, through Leoni, and Gus Dinovo for the partnership, made an oral agreement for the storing of trucking equipment on plaintiff's lot at an agreed rental of \$75 per month. The partners organized the defendant corporation. They owned all the shares of stock. In September, 1959, the Dinovo brothers sold their shares of stock to Mr. Wilkins. In the list of accounts payable they did not include the name of plaintiff as a creditor. Plaintiff sent a bill each month to the partners and on incorporation to the corporation. Five payments totaling \$850 were paid to plaintiff and credited to the rental account. The trial judge said that the testimony established an agreement between plaintiff and Gus Dinovo. He thought this was an individual agreement not binding on the corporation. He commented that Gus Dinovo was a friend of the president of plaintiff and that after hearing Dinovo testify he could not believe him under oath. He gave judgment for \$150 because defendant continued to use plaintiff's property for approximately two months after being informed. The testimony of Dinovo is not contradicted. It cannot be rejected. He testified that he and his brothers "changed the partnership into a corporation some time in 1959" and that the corporation took over all of the assets and obligations of the partnership. The testimony of Dinovo is corroborated by the facts and circumstances. The corporation was organized. The stock was sold to Wilkins. The trucking equipment continued to be stored on plaintiff's lot. The account book kept by the partnership continued to be used as the account book of the corporation.

Plaintiff had no control over the manner in which the partnership or the corporation kept accounts. The fact that the indebtedness to plaintiff was not shown on defendant's books or in the list of accounts supplied by the Dinovo brothers to Wilkins at the time of the stock transfer cannot defeat plaintiff's claim. The only real dispute is not the validity of the debt but whether the corporation became the debtor. In view of the positive testimony supporting plaintiff's claim and strong corroborating circumstances, we think that it was the duty of the trial judge to enter judgment for the amount proved.

Defendant mentions but does not argue that the promise upon which plaintiff sues violates the statute of frauds in that it is unenforceable because not in writing. This defense was not presented in defendant's answer or in any manner in the trial court. Plaintiff had no opportunity to meet it and the trial judge was not given the opportunity to pass on it. Section 43(4) of the Civil Practice Act mentions the statute of frauds as one of the defenses required to be plainly set forth in the answer or reply. It is interesting to note that Sec. 48 states that the defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon the grounds, among others, that the claim or demand asserted is unenforceable under the provisions of the statute of frauds. Under the facts of this case we do not think that the statute of frauds may be interposed. The defendant is in no position to urge that defense at this time.

The judgment is reversed and the cause is remanded with directions to enter judgment against the defendant for \$1,425. Ebbert v. Metropolitan Life Ins. Co., 369 Ill. 306, 310.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, P.J., and BRYANT, J., concur.

ABST.



48520

RALPH BARTUCH,

Appellee,

v.

HENRY M. KARIKOMI,

Appellant.

34 I.A. 313

APPEAL FROM THE TOWN COURT

OF CICERO

OF COOK COUNTY, ILLINOIS

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

Plaintiff brought suit in the town court of Cicero, Illinois to recover damages for personal injuries and property damage alleged to have been sustained as the result of a collision with defendant's car at the intersection of La Salle and Superior Streets in the City of Chicago on November 17, 1959, due to defendant's alleged negligence. Defendant was not a resident of the Town of Cicero but, rather, a resident of Chicago, living at 1032 West Oakdale Avenue. Within the time prescribed for pleading, defendant, with supporting affidavit, duly filed a special appearance and motion to dismiss or in the alternative a motion to transfer the cause to the circuit court of Cook County, alleging that the territorial jurisdiction of the town court of Cicero was limited to the Town of Cicero, that the accident did not occur within the territorial limits of the town, and that defendant was not at the time of the occurrence, nor at the time of service of process upon him, nor at the time the motion was made, a resident of the Town of Cicero, but at all times resided at 1032 West Oakdale Avenue in Chicago, and contending that the town court of Cicero is without jurisdiction of causes based upon occurrences taking place outside the territorial

jurisdiction of the court and involving defendants not residents of the Town of Cicero. Both the motion to dismiss and the alternative motion to transfer were denied by the town court of Cicero, and defendant was ordered to plead within thirty days. He filed no further pleading, and on April 27, 1961 a motion was made for default judgment by reason of defendant's failure to plead. Pursuant to this motion the court ordered that "a judgment by default be allowed in favor of the plaintiff in the amount and in accordance with the complaint," from which defendant appeals.

In his brief plaintiff "agrees completely" that since the case of *People ex rel. Norwegian-Am. Hosp., Inc. v. Sandusky*, 21 Ill.2d 296 (1961), the law "as to the venue question has been settled and hence, the instant case should be transferred to the Circuit Court of Cook County after vacating of the default judgment." That case is squarely in point and decisive of the issue presented.

However, plaintiff's counsel states that he had several defaults in other cases entered on the same date as was the one here under consideration, and that judgment by default was entered in the instant proceeding by mistake and inadvertence. He argues that defendant's counsel, rather than appealing from the judgment, should have filed a further motion to vacate the court's order denying defendant's motion to transfer the cause, and therefore asks that the appeal be dismissed. If defendant had pursued this course his motion to vacate would have constituted a general appearance under the provisions of paragraph (3) of section 20 of the Civil Practice Act (Ill. Rev. Stat. 1961, ch. 110) which reads as follows:

" If the court sustains the objection, an appropriate order shall be entered. Error in ruling against the defendant on the objection is waived by the defendant's taking part in further proceedings in the case, unless the objection is on the ground that the defendant is not amenable to process issued by a court of this State."

In Winn v. Vogel, 345 Ill. App. 425, 430 (1952), the court pertinently observed with reference to statutory limitation on venue that

"this is a valuable privilege conferred upon the defendant, which he may waive, but his right to insist upon it in apt time by proper objection, motion or plea, has always been recognized."

The principal ground urged for dismissal of the appeal is that the judgment of the town court of Cicero was not final. If the judgment were allowed to stand plaintiff could sue out an execution and recover the amount of \$10,000.00 sought in the complaint and awarded by the default judgment; this was a final judgment.

Accordingly the judgment of the town court of Cicero is reversed and the cause remanded with directions to transfer it to the circuit court of Cook County, as provided by paragraph (2) of section 8 of the Civil Practice Act.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

BRYANT and BURKE, JJ., concur.

ABST.

48190

JAMES J. CAREY and FRANCES
CAREY, his wife,

Plaintiffs-Appellees,

v.

ADA M. LEE, as Administratrix of
the Estate of WILLIAM M. LEE,
deceased, LEES CHEMICAL PRODUCTS
CO., a corporation, et al.,

Defendants-Appellants.

(34 I.A. 2314)

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

James J. Carey and Frances Carey, his wife, filed a complaint against William M. Lee and Ada M. Lee, his wife, alleging a partnership, and seeking dissolution, an injunction and an accounting. Defendants denied that there was a partnership and said that plaintiffs were not entitled to an accounting. The master in chancery to whom the case was referred became ill. Thereafter the chancellor appointed a Special Commissioner to report his findings of fact and conclusions of law, based on the transcript of testimony before the master, to which there was no objection. The Commissioner found that there was a partnership which the parties dissolved, that there were no profits or losses and recommended that the complaint be dismissed for want of equity. The chancellor found that plaintiffs were entitled to an accounting as to profits realized during the term of the partnership and directed a further hearing. The Commissioner filed a second report finding that there was due to plaintiffs \$6,164.35. The chancellor entered a decree dissolving the partnership, and judgment against defendants for \$6,164.35, plus

interest at 5% per annum from February 26, 1953, because of unreasonable and vexatious delay, and costs. William M. Lee died July 16, 1954, and the administratrix of his estate was substituted as a defendant. Defendants appeal.

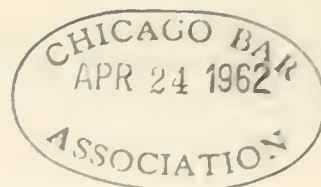
An appearance but no brief has been filed for plaintiffs. We agree with defendants' contention that plaintiffs failed to prove that a partnership existed. Plaintiffs were anxious to form a partnership with defendants. Defendants did not wish to become involved in a partnership. Defendants indicated that they might be interested in forming a corporation in which plaintiffs and defendants would participate. The conduct of plaintiffs indicates that they did not consider themselves partners of the defendants. The finding and decree are against the manifest weight of the evidence. It is unnecessary to consider other points.

The decree is reversed and the cause is remanded with directions to enter a decree dismissing the complaint for want of equity.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, P.J., and
BRYANT, J., concur.

ABST.



48525

CLARENCE RANDLE,

Plaintiff-Appellant,

v.

JAMES ADAMS,

Defendant-Appellee.

) APPEAL FROM

) MUNICIPAL COURT

) OF CHICAGO

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

Plaintiff appeals from a judgment entered on a jury verdict in favor of defendant in an action to recover for personal injuries sustained by plaintiff while riding as a guest passenger in defendant's car. The jury also answered in the negative a special interrogatory as to whether defendant was guilty of wilful and wanton misconduct.

Plaintiff asserts that the trial court committed reversible error in these particulars: first, by not allowing plaintiff's counsel to inquire of the defendant whether or not he ever made statements concerning a plea of guilty to negligent driving arising out of the occurrence in question; secondly, the court improperly excluded certain hospital records from evidence; thirdly, the jury was erroneously instructed.

Around 7:00 in the morning on July 20, 1957, defendant offered to take plaintiff for a ride. The weather was hot and it was a clear day. Traffic was light. At about 8:00 a.m. and while proceeding east on 107th Street, which is a two-lane black top street, the steering gear "snatched" to the right and while trying to straighten up the car plaintiff bent the steering wheel. The car went off the road quickly to the right and hit

a utility pole about ten feet from the road.

The area where the accident occurred was residential and the speed limit was 25 miles per hour. Plaintiff testified that immediately prior to the accident defendant was driving 50 to 60 miles per hour, that he told plaintiff to slow down and take it easy, that defendant was singing and whistling during this time, that the left side door came open 10 or 12 times and that just before the accident the door opened again and defendant was trying to shut it and hold it closed with his left elbow.

Defendant testified that his speed was 25 to 30 miles per hour. He had owned the car for three years and thought it was in good shape. He had had no indication of difficulty with the steering mechanism.

The police arrived about five minutes after the accident. A police investigation determined that defendant was sober, and there was no evidence of drinking.

It is urged that the court erred in not allowing plaintiff to introduce an admission by defendant that he plead guilty to a negligent driving citation arising out of the occurrence in question. The admission was an oral statement which defendant allegedly made when he appeared in plaintiff's attorney's office at the latter's request. The attorney wrote down the oral statement. Defendant denied the admission and cannot read. During a hearing in chambers it was brought out that the Municipal Court Records not only fail to show a plea of guilty to negligent driving, but actually show a discharge from that citation. However, plaintiff sought to introduce this as an admission

against interest, regardless of the underlying truth or falsity of the statement. The trial court excluded this as not being germane to the ultimate issue of wilful and wanton misconduct. Plaintiff admits being unable to find an Illinois case wherein a plea of guilty to negligent driving was attempted to be used in a subsequent civil suit under our "guest statute" requiring proof that defendant was guilty of wilful and wanton misconduct, but he argues that what constitutes wilful and wanton misconduct is a question of degree, citing *Foster v. Bilbruck*, 20 Ill. App.2d 173, and that this admission as to negligent driving when coupled with the other facts and circumstances of the case might have been sufficient to prove wilful and wanton misconduct. We agree that what constitutes wilful and wanton misconduct is a matter of degree, that each case must rest on its own facts, and that no all encompassing definition can be made; but one thing is certain and that is that wilful and wanton misconduct is not the same thing as negligence. Even a concession of negligence would not aid plaintiff in proving wilful and wanton misconduct.

Bartolucci v. Falletti, 382 Ill. 168; *Chicago, Rock Island & Pacific Ry. Co. v. Hamler*, 215 Ill. 525; see *Wise v. Wise*, 22 Ill. App.2d 54, 58. The facts surrounding the occurrence in question provide the proper basis for determining the ultimate issue of wilful and wanton misconduct, rather than a legal conclusion on a different issue, i.e., negligence, made by an uneducated man a long time after the occurrence and after a discharge at the hearing on negligent driving. Such a statement would not aid the jury in deciding the relevant issue, but would

tend to cloud the issue or mislead the jury.

Since the jury answered "no" to a special interrogatory on wilful and wanton misconduct, the jury decided the issue of liability without ever reaching the question of damages. The hospital records which plaintiff sought to introduce under Rule 5 of the Rules of the Municipal Court, while admitting that such records would not be admissible in the Circuit or Superior Court, and which records the trial judge viewed as containing hearsay, opinion and conjecture, applied only to the question of damages and that question is not pertinent to this appeal. These records certainly could not have been used as an aid in determining the basic issue of liability.

Plaintiff's final contention that the court improperly instructed the jury and placed undue emphasis on certain factors is without merit. Defendant's tendered instruction No. 2, given by the court, properly instructed the jury that plaintiff must prove wilful and wanton misconduct by a preponderance of the evidence. Defendant's instruction No. 4 simply recited the guest statute. Plaintiff's instruction No. 10, which the court refused to give, was essentially the same as defendant's prior instruction No. 2 on wilful and wanton misconduct, and plaintiff's characterization of the latter as peremptory does not warrant his conclusion that the court thereby indicated its feelings on the disputed questions of fact. The instructions considered as a whole substantially presented the law of the case fairly to the jury. *Bunton v. Illinois Central Ry. Co.*, 15 Ill. App.2d

-5-

311, 330.

The judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P.J., and BURKE, J., concur.

ABST

48410

B. H. DEACON CO., INC.,

Appellee,

v.

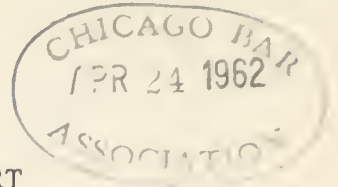
E. C. SMITH MFG. CORP.,

Appellant.

(34 I.A.² 315)
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO



MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

In a suit to recover damages for breach of contract, the court found the issues for plaintiff and entered judgment in the amount of \$1902.79, from which defendant appeals, contending that there was no contract because plaintiff's acceptance varied materially from and did not conform to defendant's offer.

It appears that on March 24, 1953 plaintiff requested defendant to quote on 18,500 toilet paper holders, for sale to the United States Navy, all to be made in accordance with bureau of ships specification No. 30-H-3. Of the holders, 15,500 were to be made of galvanized steel and 3000 of brass, and all to be packed 100 to the carton. On March 27, 1953 defendant offered to make the holders "Price F.O.B. Our Factory." On May 14, 1953 plaintiff ordered the 3000 brass holders to "be delivered 180 days after date of contract." The order required compliance by defendant with the bureau of ships specifications, plus two additional specifications (MIL-P-3682 and MIL-STD-129); inspection of the items by the inspector of naval material; delivery by the defendant of the goods to carrier, wharf, or freight station (at the navy's option) at or near the plant of defendant; service packing; and conformity with government general provisions form

32, with subsequent amendments. Thereafter, on May 20, 1953, defendant advised plaintiff that it could not deliver the items for the price previously quoted, and suggested consideration of another item manufactured by defendant. In subsequent correspondence plaintiff insisted on delivery of the goods in accordance with its order, and defendant refused to comply.

Defendant interposes the defense that plaintiff's acceptance did not conform to defendant's offer. The basic issue is to be resolved by two documents, namely, the offer of defendant dated March 27, 1953, and the acceptance by plaintiff dated May 14, 1953. Defendant contends that there was no contract because plaintiff's acceptance in the form of its order of May 14, 1953 introduced several variations and added conditions to the offer of March 27, 1953. The defendant's offer stated "Price F.O.B. Our Factory"; plaintiff's order gave the navy the option of requiring delivery by defendant at defendant's factory, or at a carrier, wharf, or freight station near defendant's factory. Defendant's offer made no commitment to prepay freight; plaintiff's order specified that freight should be prepaid. Defendant's quotation was figured on a prospective order of 18,500 holders, all of the same design; plaintiff's order was limited to 3000; defendant stated in one of its letters that it could not afford to tool for a small quantity order. Defendant's offer was addressed to plaintiff alone; plaintiff's order brought in the navy as a third party, thus making defendant responsible not only to plaintiff but to the navy, with its additional specifications, inspections, contract-cancellation rights, delivery-date limitation, price-

renegotiation provisions, etc. Defendant's offer of March 27, 1953 was based on the conditions set out in plaintiff's letter of March 24, 1953, not on later conditions. From these facts it is obvious that plaintiff's order of May 14, 1953 was not an acceptance of defendant's offer of March 27, 1953, but a rejection. The record shows that defendant never accepted plaintiff's order.

In *Valdez v. Viking Athletic Ass'n*, 349 Ill. App. 376 (1953), the court held that a letter purporting to accept an offer of employment was at variance with the terms contained in the offer and therefore the letter could not be considered an acceptance of the offer. The court stated (p. 379) that it is a fundamental rule of contracts that to constitute a contract by offer and acceptance, the acceptance must conform exactly to the offer, and that if there is a restatement of the terms of the offer with some variations, however slight, the contract cannot be regarded as consummated, citing *Snow v. Schulman*, 352 Ill. 63, 71 (1933).

In the *Snow* case there was a variance between the terms drawn up in an application for a loan and the terms decided upon by the prospective lender. "To constitute a contract by offer and acceptance," said the court (p. 71),

"the acceptance must conform exactly to the offer, and although a reply to an offer purports to accept the offer, it is not an acceptance but is a counter-offer and does not create a contract where it adds qualifications and requires the performance of new conditions. (*Worley v. Holding Corp.* 348 Ill. 420.) A letter written in reply to an offer, which re-states the terms of the offer but with some variations, though slight, cannot be regarded as the consummation of a contract and requires an acceptance upon the terms thus stated, and until unequivocally accepted is a mere proposition or offer. *Maclay v. Harvey*, 90 Ill. 525."

In the Worley case (1932) the defendant sought to confirm the purchase of definite amounts of bonds to be issued by three school districts and a park district, subject, in each instance, to three conditions: the authorization of the bonds at an election to be held "within the next few days as scheduled"; a showing that the assessed value of the taxable property in the district permitted their issuance; and the submission of an opinion by the attorney designated approving the bond issue. The letter of the plaintiff was not an acceptance of the proposition contained in defendant's letter but was in fact a counterproposition; it substituted, in the case of each bond issue, an approximate for a definite number of bonds, and the uncertain phrase "if and when issued" for an election shortly to be held. In deciding that there was no contract, the court said (p. 425):

"An acceptance must be unequivocal in order to create a contract. (Section 58, Re-statement of the Law of Contracts, the American Law Institute). A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer. (Section 60 of the same Re-statement). To constitute a contract by offer and acceptance the acceptance must conform exactly to the offer and if it contains new conditions there is no contract. (Scott v. Fowler, 227 Ill. 104; Brach v. Matteson, 298 id. 387). A letter written in reply to an offer, which re-states the terms of the offer, but with some variations, though slight, cannot be regarded as the consummation of a contract, and requires an acceptance upon the terms thus stated, and until unequivocally accepted, is only a mere proposition or offer. MacLay v. Harvey, 90 Ill. 525."

In accord, El Reno Grocery Co. v. Stocking, 215 Ill. App. 393, 397-398 (1919), aff'd 293 Ill. 494, 503-504 (1920).

It has been generally held that one party's modified acceptance amounts to a rejection of the other party's offer and cannot be used to support a contract. Krause v. Buttino, 4 Ill. App. 2d 75, 79 (1954); Johnson v. Whitney Metal Tool Co., 342 Ill. App. 258, 264-266 (1950); Fox v. Turner, 1 Ill. App. 153, 159 (1878).

We have carefully read the correspondence between the parties and have reached the conclusion that plaintiff's offer was never accepted. On May 14, 1953 plaintiff had determined to add many conditions which it decided were necessary, and specified the many variations heretofore stated. Thereafter, on May 20, 1953, defendant advised plaintiff that it could not supply the items at the prices quoted, that it had made an error in its quotations with respect to the bureau of ships specifications, that the price of brass had advanced in the intervening period, and it finally made a counteroffer to supply a different item for the prices previously quoted. It is obvious that this letter was not an acceptance of plaintiff's order. The reasons assigned for declining the order are not material; the decisive point is that it did not accept the order which was no more than a counter-proposition.

For the reasons indicated, we think it was error for the court to enter judgment in favor of plaintiff. The judgment is therefore reversed, and the cause remanded with directions that judgment be entered in favor of defendant for costs.

Judgment reversed, and cause remanded
with directions.

BRYANT, J., and
BURKE, J., concur.

48443

AUTO EXCHANGE, INC.,
an Illinois Corporation,

Plaintiff-Appellant,

v.

MORRIS LITBERG,

Defendant-Appellee.

34 I.A.2 329

APPEAL FROM

SUPERIOR

COOL



MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

Plaintiff obtained a judgment against defendant in the amount of \$11,025 in an ex parte hearing without a jury on December 1, 1954. More than five years later, on June 21, 1960, defendant petitioned the court to vacate the judgment. On January 17, 1961, defendant was granted leave to file instant an amended petition to vacate the judgment of December 1, 1954. Plaintiff filed a written motion to dismiss the amended petition which was denied in an order entered by the trial court. Plaintiff elected to stand upon the motion and waived the right to answer the amended petition. Accordingly, the court quashed the capias ad satisfaciendum previously issued, vacated the former judgment and reassigned the case to the trial calendar. This is the final order from which plaintiff appeals. ILL.REV.. STAT.1959, ch. 110, § 72(6).

Plaintiff corporation is in the business of buying and selling automobiles. On August 31, 1950, plaintiff filed its original complaint alleging that from April to July 1950 the defendant sold plaintiff five stolen automobiles and that defendant knew that the automobiles were stolen and that

plaintiff acted in good faith in purchasing them. Plaintiff paid defendant \$9,375 for these automobiles and alleged a willful conversion of the monies paid. Plaintiff filed a demand for jury trial.

Personal service of summons on defendant was made on September 29, 1950, and an attorney filed an appearance and answer denying that defendant knew or reasonably should have known that the automobiles were stolen and denying willful conversion of the funds. In November 1953, defendant's attorney withdrew and a new lawyer was substituted. This was the first in a series of withdrawals and substitutions. On December 1, 1954, the case was called for trial in regular course. Defendant was not present at the trial, being confined at that time to the penitentiary at Joliet, Illinois, nor was he represented by counsel. At this time plaintiff was granted leave to file an amended complaint with defendant's original answer to stand, and plaintiff was permitted to withdraw his demand for jury trial. The amended complaint alleged that defendant had sold six stolen automobiles for which plaintiff paid \$11,025, that defendant had acted with intent to cheat and defraud, and prayed for a special finding that malice was the gist of the action and for issuance of a capias ad satisfaciendum. The court heard the evidence ex parte, found that malice was the gist of the action, and entered judgment for plaintiff in the amount of \$11,025. The court referred to the defendant in the judgment order as being in default for failure to respond to the trial call. However, this is not

properly a default judgment. The withdrawal of defendant's attorney or the failure to appear at trial did not result in the withdrawal of the answer on file, and it would be erroneous to render a default judgment when a plea to the merits of the action is on file. *Harris v. Juenger*, 367 Ill. 478.

Defendant claimed in his amended petition to vacate that after notice that his attorney intended to withdraw he had written a letter to the Motion and Assignment Judge of the Superior Court on November 18, 1954, claiming that petitioner had documentary evidence in his possession which would be his defense in the case, and requesting that he be brought before the court to testify or that the case be continued until his parole or discharge. However, there is no recital that such a letter was ever received or any evidence, other than petitioner's claim, that it was ever written. As grounds for vacating the judgment, the amended petition claimed in substance: that plaintiff's amended complaint differed materially from the original complaint, which constituted the filing of a new lawsuit, and that the amended complaint was filed without notice of any kind to defendant; that allowing the amended complaint and having defendant's original answer stand against this deprived the court of jurisdiction; that withdrawal of the jury without notice to defendant deprived him of his rights without due process of law and deprived the court of jurisdiction to proceed further; and that the judgment was void ab initio because the court was without jurisdiction.

Petitioner asserted that he did not know or discover

the facts of this case until on or about June 3, 1960, when he received a letter from plaintiff's attorneys advising him of the judgment. The asserted defense to the prior action is that the automobiles were purchased from Albert Fox of Wisconsin and that petitioner did not know that they were stolen.

The petition was brought under Section 72(7) of the Civil Practice Act.

The petition to vacate the judgment of December 1, 1954, is barred by the statute of limitations contained in Section 72 of the Civil Practice Act, unless the judgment was void. ILL. REV. STAT. 1959, ch. 110, § 72(3), (7). Sub-section 3 provides:

"The petition must be filed not later than 2 years after the entry of the order, judgment or decree. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years."

Petitioner's imprisonment does not come within the meaning of "legal disability" so as to exclude the time of imprisonment in computing the statute of limitations. This was decided in *Morgan v. The People*, 16 Ill. 2d 374, where the court stated at page 378:

"It is quite clear therefore that the term 'legal disability' as used in section 72 can not and does not have reference to the common-law definition of legal disability. It is the prevailing view in this country that imprisonment does not suspend the running of the statute of limitations unless the statute expressly so provides, and this is true even where the statute makes an exception as to persons under legal disability. . . . In Illinois an imprisoned person has the right to bring a civil action in the courts of this State and therefore no reason exists for excepting such persons from the operation of the Statute of Limitations."

Even under the former statute, prior to the 1955 amendments, the motion to vacate would be barred, unless the previous judgment was void and subject to collateral attack at any time, because the then governing five year period of limitations would have expired. ILL,REV.STAT.1953, ch. 110, § 196.

Defendant's allegation in the amended petition to vacate that he was deprived of his right to jury trial is without merit. Under section 64 of the Practice Act as then in force the defendant was not entitled to notice that plaintiff had withdrawn his jury demand. Anzalone v. Johnson, 345 Ill. App. 410 (Abst.); Forsberg v. Harris, 27 Ill. App. 2d 159. Petitioner does not come within the rule of Westmoreland v. West, 19 Ill. App. 2d 161, which shows the difference between the law as it now exists and the statute which was in force on December 1, 1954.

Defendant's other contentions, except for what we have to say concerning the finding of malice, do not go to the jurisdiction of the court, even if these contentions are assumed to be valid, but rather petition the court to review its former ruling and hold it erroneous. This cannot be done because the court had jurisdiction of the parties and subject matter, the judgment was not void, and the period of limitations has expired for petitioning the court to vacate the prior judgment. ILL,REV.STAT.1959, ch. 110, § 72(3). Since this fact controls our decision we need not go into the question of whether petitioner shows both a meritorious defense and due diligence.

Till v. Kara, 22 Ill. App. 2d 502.

In Wood v. First Nat. Bk. of Woodlawn, 383 Ill. 515, 522, the court stated:

"Jurisdiction of the subject matter is the power to adjudge concerning the general question involved, and if a complaint states a case belonging to a general class over which the authority of the court extends, the jurisdiction attaches and no error committed by the court can render the judgment void. If a judgment is collaterally attacked under such circumstances of jurisdiction, it is immaterial how irregular or erroneous its proceedings may have been. Such a judgment is binding on the parties and on every court unless reversed or annulled in a direct proceeding."

A motion seeking to set aside a final judgment of a court having jurisdiction of the parties and the subject matter is one of serious import and if treated lightly threatens the stability of our courts. Conard v. Camphouse, 230 Ill. App. 598, 601; Gustafson v. Lundquist, 334 Ill. App. 287, 293. Although the amended petition to vacate recites several times that the court lacked jurisdiction, there is no showing wherein the court lacked or exceeded its jurisdiction as to the judgment itself. Nor has the court been enlightened by defendant's failure to file a brief or appearance in this appeal.

As concerns the finding of malice, the instant case satisfies the rule laid down in Ingalls v. Raklios, 373 Ill. 404, that the judgment must contain a finding that malice is the gist of the action and that finding must appear on the face of the judgment. However, we must concern ourselves with the question of whether the court exceeded its jurisdiction in finding that malice was the gist of the action, which serves



as a basis for the issuance of a capias, and which would make this aspect of the prior judgment void and subject to collateral attack. As stated in *Armstrong v. Obucino*, 300 Ill. 140, at 142, 143:

" . . . a decree may be void because the court has exceeded its jurisdiction. . . . The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment or decree, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds according to the established modes governing the class to which the case belongs and does not transcend in the extent and character of its judgment or decree the law or statute which is applicable to it. (Citing cases)."

Kryl v. Zelezny, 290 Ill. App. 599 (Abst.), involved a default judgment which included a special finding that "malice is the gist of this action," and the court therein held:

" . . . that in view of the fact there was nothing in the language of the complaint by way of specific prayer for relief or otherwise to indicate or suggest to defendant that a special finding that malice was the gist of the action would be brought against him, Zelezny being in default, the court was without jurisdiction to enter such finding."

Malice as the gist of an action, although not precisely defined by the cases, nevertheless has a certain meaning and, as stated in *In Re Petition of Blacklidge*, 359 Ill. 482, at 489:

" . . . applies to that class of wrongs which are inflicted with an evil intent, design or purpose. It carries the implication that the guilty party was actuated by improper and dishonest motives, with the intention to perpetrate an injury on another. (Citing cases). The 'gist of the action' constitutes the essential ground or object of a suit, without which there is not a cause of action. (Citing cases). Malice may be the gist of the action if properly pleaded. (Citing cases). Whether malice is the gist of a particular action is to be determined from the charges made in the declaration. . . ."

In the instant case plaintiff's original complaint, to which defendant responded before withdrawal of his attorney and failing to appear at trial call, did not pray for a finding that malice was the gist of the action or for the issuance of a *capias*. And we are unable to say, after careful consideration of the relevant cases, that item 5 of the original complaint (which defendant answered and denied) that "defendant has wilfully and maliciously converted to his own use the monies paid him by plaintiff" was sufficient to apprise defendant that a finding of malice as the gist of the action would result. *Ingalls v. Raklios*, *supra*, shows that laws in derogation of liberty must be strictly construed and that imprisonment for tort is contrary to the general tendency of our times. In *Forsberg v. Harris*, 27 Ill. App. 2d 159, which involved a default judgment and *capias* against a non-resident, the court held at page 174:

"The allegations in the complaint in the case before us were not sufficient to apprise the defendant that a finding would be entered by the court that malice was the gist of the action and that a *capias* would issue thereupon. Under the rule laid down in the *Kryl* case that portion of the court's finding in the judgment was erroneous, and subject to collateral attack."

Although this is not a default judgment, as the lower court apparently thought and which the appellant argued before this court, the reasoning of the *Kryl* and *Forsberg* cases applies to the facts and circumstances of this case. *Ellman v. DeRuiter*, 412 Ill. 285, 291, shows that a petition under section 72 of the Practice Act:

". . . has been used extensively as a procedural device to prevent injustice by making possible the vacation of judgments entered without notice

to a party where the circumstances were such as to require specific notice. (Jacobson v. Askinaze, 337 Ill. 141)."

Accordingly, we hold that the allegations in the original complaint were not sufficient to apprise this defendant that a finding would be entered by the court that malice was the gist of the action and that a capias would issue thereupon. The court exceeded its jurisdiction in allowing an amended complaint against an absent defendant to pray for such a finding and relief. In all other respects the prior judgment was not void and is not subject to attack because the period of limitations has expired. That part of the order of January 25, 1961 quashing the capias ad satisfaciendum is affirmed; that part thereof vacating the judgment of December 1, 1954 is reversed and the cause is remanded with directions to amend the judgment of December 1, 1954 by striking out the finding that malice is the gist of the action, and the judgment is restored as so amended.

Affirmed in part; reversed in part and cause remanded with directions.

FRIEND, P.J., and
BURKE, J., concur

ABST.

48504

WERNER MFG. CO., a Corporation,

Plaintiff-Appellee,

v.

THE SARDIS LUGGAGE CO., a
Corporation,

Defendant-Appellant.

34 I.A. 352

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO



MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Plaintiff is at Brookfield, Illinois, and defendant is at Sardis, Mississippi. Plaintiff filed a two count amended statement of claim presenting distinct causes of action for breach of contract. Count I sought to recover \$5,893.76 on the theory that plaintiff accepted and fully complied with a purchase order issued by the defendant for a mold to be made in accordance with specifications. Count II sought damages of \$4,920.95 on defendant's alleged agreement to purchase at plaintiff's cost all raw material which plaintiff might have on hand when the defendant ceased to do business with plaintiff or changed the color of its product. This count further alleged that the raw material had no market value other than as scrap. Plaintiff claimed to have a quantity of raw material on hand because of canceled orders and anticipated requirements of defendant. Defendant's answer sufficiently presented its theory of defense. The jury returned a verdict for plaintiff for \$9,650. Defendant's motions for a directed verdict, for judgment notwithstanding the verdict and in the alternative for a new trial were denied. Defendant appeals from the judgment on the verdict.

Defendant urges that the failure of plaintiff to perform the conditions of the purchase order precludes recovery under Count I. Plaintiff insists that it proved its allegations of performance of the contract for the mold under this count. In deciding whether defendant is entitled to a judgment notwithstanding the verdict, the only evidence which may be considered is that favorable to the plaintiff and that introduced by the defendant which was uncontroverted or not inconsistent with the evidence favorable to the plaintiff. Plaintiff seeks to recover the full price of the mold under the purchase order. It was incumbent upon plaintiff to prove that it fully performed in accordance with the terms of the purchase order. Plaintiff does not ask a quantum meruit recovery.

Plaintiff is engaged in the business of custom molding plastic parts for manufacturers. The defendant is a suitcase manufacturer. The defendant purchased suitcase handles and bindings from plaintiff. Bindings are strips of plastic used around the outside edges of a suitcase. On April 18, 1955, plaintiff was given an order for a mold at a "price complete" of \$5,893.76, to be delivered "as soon as possible." The purchase order stated: "Mold to produce Weekend bindings **having a cross-section** as per drawing attached; length, corners, overall shape and smoothness of surface finish on parts produced are to be exactly like sections produced by our present Weekend mold now being used by you in production to fill our orders, 1,000 sections satisfactory to us are to be made with this mold before it is accepted by us."

No work was done on this order until the middle of November, 1955, when plaintiff sent the mold to Chicago Mold Engineering Company and instructed it to rework the mold so it would make parts corresponding in cross-section to those produced by the mold being used in production. In the latter part of January or early February, 1956, the first samples of the mold were sent to the defendant. Plaintiff was then advised by letters dated February 10 and 15, 1956, that the samples did not comply with specifications. After receiving these letters plaintiff sent the mold back to the mold maker with instructions to make the necessary corrections. Several months later the mold was returned to plaintiff and when it had a break in its production schedule the mold was sampled. Thereafter discussions took place between representatives of plaintiff and defendant with regard to "regating" the mold in order to decrease its cycle time and the smoothness of the finish on the parts produced. On March 5, 1957, at plaintiff's request, the defendant set forth in writing all of the objections to the mold which had to be corrected in order to produce parts which conformed to those made by the mold then being used in production. The defendant also pointed out that the samples submitted weighed from 15% to 18% more than those specified in the order. It was uncontroverted that this variation in weight would increase defendant's cost for bindings an estimated \$5,000 to \$6,000 per year.

Plaintiff then returned the mold to the mold maker and instructed it to make the corrections outlined in defendant's letter of March 5, 1957. After the mold was returned to plaintiff,

12 samples were made and forwarded to defendant. The latter on December 2, 1957, acknowledged receipt of the samples and advised that the deviations outlined in its letter of March 5, 1957, had been corrected, but that an irregular line underneath the bead on almost the entire length of one edge of the binding had been created. This letter also pointed out that there was a rough condition on the surface of each end of the binding and that there were "pimples" and other irregularities on the under surface of the binding. It was undenied that these "pimples" were partly visible on the outside of the case and that in warm weather when the binding tended to be a bit softer they would be sufficiently visible to spoil the appearance of the suitcase. Suitcases shipped to defendant's customers are subjected to temperatures of 130 to 140 degrees while in a freight car and to high temperatures when in the trunk of an automobile. The letter concluded by stating that if the bumps, ridge and ends of the binding could be cleaned up, the mold would be acceptable, assuming no equally objectionable conditions were created. Plaintiff then sent the mold back to the mold maker with instructions to remove the bumps and rough spots. In January, 1958, after the mold had been returned by the mold maker, plaintiff called defendant and asked how many bindings should be sent in order to obtain approval of the mold. Plaintiff's president testified that although defendant's president stated that he would let plaintiff know, no word was received.

Plaintiff says that a factual question was presented to the jury to determine whether the binding complained

of by the defendant was or was not evidence of plaintiff's satisfactory production of the mold. There was no evidence that the mold at any time complied with the specifications of the purchase order. There was no showing that all the deviations had been corrected. There was no compliance with the requirement of the purchase order that 1,000 samples satisfactory to the defendant be submitted before the mold would be accepted. A comparison of the binding upon which plaintiff relies with a binding made on the mold being used in production demonstrates that all reasonable persons would agree that there were substantial deviations. There is no support in the record for plaintiff's assertions that the mold was ready in January, 1958. We are of the opinion that plaintiff failed to make out a prima facie case under Count I.

The second point advanced by defendant is that plaintiff produced no evidence of an agreement to reimburse it for such raw material as it might have on hand in the event defendant ceased doing business with plaintiff or decided to change the color of its product. Plaintiff rejoins that it proved the agreement alleged in Count II. The evidence in support of this count was that on August 22, 1957, the president of defendant visited plaintiff's plant and advised of the quantity of finished goods that defendant expected to order for the next calendar quarter and requested plaintiff to determine how much raw material would be required to produce these goods. An office girl made this computation and reported that the total requirement was 12,300 pounds of dubonnet and 13,600 pounds of saddle colored

vinyl. The plant foreman was directed to take an inventory of the raw material in these two colors. After he reported the amount on hand, the president of defendant requested plaintiff to order 5,000 pounds each of dubonnet and saddle. Plaintiff called its supplier of raw materials and placed the order. Plaintiff requested written authorization to make this purchase. On or about September 18, 1957, a letter was received from defendant which advised plaintiff to have on hand sufficient vinyl pellets to make another quarterly order of bindings and handles, with the exception of the colors dubonnet and saddle, since defendant was practically sure of discontinuing these colors and would not want any of the material on hand until a final decision was made.

Certain purchase orders of the defendant and testimony indicated that the following merchandise had not been shipped on each of these orders:

| | |
|----------------------------|----------------|
| Exhibit 1 Pullman bindings | 4,680 dubonnet |
| | 3,600 saddle |
| Exhibit 2 Weekend bindings | 3,840 dubonnet |
| Exhibit 3 Pullman bindings | 1,440 dubonnet |
| | 720 saddle |
| Exhibit 8 Handles - | 9,740 saddle |

The only evidence indicating that any of these orders had been canceled was a letter from defendant of August 26, 1957, advising that the mold for Pullman bindings would be picked up on September 3. This had the effect of canceling the orders for Pullman bindings, since this was the only mold of that type.

The president of plaintiff testified that on November 27, 1957, it had on hand 8,900 pounds of dubonnet and 6,600 pounds of saddle colored material for which it had paid 32¢ per pound for dubonnet and 31¢ per pound for saddle, or a

total of \$4,920.95. On November 21, 1957, plaintiff shipped at defendant's request 5,000 pounds of each of the dubonnet and saddle to another manufacturer and was paid in full for this material. On December 2, 1957, defendant wrote plaintiff that it was waiting for the results of the attempt to rework or recolor the dubonnet and saddle material, and stated that the matter would be discussed further after a report was received. Plaintiff then told defendant that the material could be recolored at a cost of 8¢ to 9¢ a pound. Defendant advised plaintiff that it might be worth while to make a test on reworking the material, and on December 18, 1957, plaintiff reported that the minimum batch for a test was 175 pounds at a cost of 57¢ per pound. On December 27, 1957, defendant advised plaintiff that inasmuch as it had substantially more material on hand than had been authorized, it was plaintiff's responsibility to work out the problem and that defendant would co-operate in any way it could.

There is no evidence of any agreement under which plaintiff would be reimbursed for the cost of the raw material it might have on hand. The most that can be inferred is an implied agreement by the defendant with reference to 5,000 pounds each of dubonnet and saddle. It is admitted that defendant took and paid for all 10,000 pounds of that material. There was a total failure to prove the existence of any contract relative to the disposition of the raw material which plaintiff might have on hand by reason of anticipated orders of the defendant for finished goods or the cancellation of such orders. As plaintiff failed to prove its case, it is unnecessary to pass on defendant's

point that plaintiff did not prove that it was damaged by the breach of contract alleged in Count II.

For the reasons stated the judgment is reversed and the cause is remanded with directions to enter a judgment notwithstanding the verdict for the defendant and against plaintiff.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, P.J., concurs

BRYANT, J., dissenting:

I cannot agree that all reasonable persons would agree that there were substantial deviations in complying with the purchase order. Defendant admitted that all deviations outlined in its letter of March 5, 1957, had been corrected. The only other pertinent issue under Count I is whether other irregularities were created, such as "pimples" on the under surface of the binding, which would make the mold unsatisfactory. On this issue the evidence was conflicting and it was properly submitted to the jury who found for the plaintiff.

As concerns Count II, it is uncontradicted that defendant requested plaintiff to order additional raw materials and there is convincing evidence of an oral contract to reimburse plaintiff for such raw materials as plaintiff would have on hand if defendant either changed the color of its product or ceased doing business with plaintiff.

This court does not sit as a fact finding body, and where there is sufficient evidence to support the findings of the jury, as there is in this case, it does not matter that



-9-

we, as hypothetical jurors, might prefer opposite conclusions of fact. The judgment should be affirmed.

STATE OF ILLINOIS

APPELLATE COURT

34 I.A. 2388

AT AN APPELLATE COURT, for the ~~Fourth~~^{THIRD} Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE BURTON A. ROETH, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE WILLIAM M. CARROLL, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 19th day
of FEBRUARY A. D. 1962, there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:

FILED

FEB 19 1962

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Robert L. Conn, CLERK
APPELLATE COURT 3RD DIST.

General No. 10372

Agenda No. 7

Alvin McDaniel,

Plaintiff-Appellee,

vs.

Otis E. Hulva,

Defendant-Appellant.

)
)
)
) Appeal from the
) Circuit Court of
) Logan County
)
)
)

ROETH, PRESIDING JUSTICE

This action was brought for injuries sustained by plaintiff, a farm hand, while plowing a field for the defendant, his brother-in-law. Plaintiff sustained an injury to his left eye and the jury found in his favor for \$17,500.00. This appeal is from the judgment entered on that verdict and the court's order denying defendant's motions for judgment n.o.v., directed verdict and for a new trial based on numerous errors assigned by defendant.

Defendant hired plaintiff to assist him in his spring plowing on a farm operated by the former. On March 21, 1956, the operation commenced and plaintiff was given an International Plow & Tractor with which to do his work. In order to engage the plow, it was necessary for plaintiff to reach behind him and pull a rope that

was attached to the back of the tractor. The tractor was moving forward and

mechanism on the plow. One jerk on the rope actuated the clutch that in turn caused the plow to sink into the ground. The clutch was supposed to turn over and lock the plow into the ground where it would be dragged through the earth behind the tractor. When the operator wished to stop plowing he jerked the rope again, engaging the clutch and causing the plow to raise out of the ground. The plow was made to operate in this fashion, some using a rope, others a rod. On March 21, plaintiff used this plow and tractor and testified that the clutch mechanism was not operating properly. He worked from 8:00 a.m. to 6:00 p.m., working in a field with defendant. At the end of the day he told defendant that the plow was defective in that it would not stay in the ground; that some 15 to 20 times in the course of the day the clutch would not hold and the plow would jump out of the ground. This necessitated his turning the tractor around and pulling the plow over the same area and that with this fault, it was necessary for him to watch the plow, that is, turn his head to the back of the tractor, to make certain the plow was at work. Plaintiff admits that this malfunction would not occur if the tractor was first brought to a stop and then the plow lowered, and that it only happened when you dropped the plow while the tractor was in motion.

The following morning when plaintiff reported back to work, he asked defendant if he had fixed it and defendant advised him.



in substance, that he had. Defendant denied that plaintiff told him of the trouble and denied he had any conversation either day regarding the functioning of the plow.

On the 21st, the two men worked one field and on the next day plaintiff plowed in another field, more distant from the house than the first. There is some dispute as to how the plowing was in fact done and who was present, but this dispute neither helps nor hinders plaintiff's case. Plaintiff's testimony was that the parties on the 21st plowed within 18 feet of a fence extending south on the side of the field. On the morning of the 22nd he commenced plowing an adjoining field alone. Thereafter he was joined by defendant's son-in-law and about 10:00 a.m. defendant came out and relieved his son-in-law. They finished at about noon and defendant told plaintiff to plow along the fence of the field plowed the day before, on his way back to the house. Defendant denies he told plaintiff to plow along the fence line.

Plaintiff raised the plow and when he arrived along the fence, dropped it and started plowing. Immediately after he started the plow, the plow jumped out of the ground. The tractor, incidentally, traveled at the rate of 3½ miles per hour. He dropped the plow again, but it jumped out again. He dropped the plow again and turned to watch to see if it stayed in the ground, with the tractor moving.



At this juncture he was struck in the face by a branch of a locust tree, a thorn from the tree piercing his left eyeball.

The tree was situated on a tract of land owned by another and not under defendant's control. The limbs extended over the fence and far enough into defendant's field so as to interfere with this operation, some 16 to 18 feet, and arched to within seven feet of the ground. Defendant and the owner of the land adjoining the fence had an agreement whereby defendant maintained the west one-half of the fence and the neighbor the east one-half. This tree was situated in the east one-half of the fence line and apparently other trees and shrubs were also on this half of the fence line. When plaintiff arrived at the fence he dropped the plow without stopping. He traveled 40 to 50 feet from the time he dropped the plow until he was hurt. As noted, the tractor moved at a rate of $3\frac{1}{2}$ miles per hour and could be stopped in two to three feet. Plaintiff testified as follows as to how the injury was inflicted:

"Well, I turned around, like this, to trip the plow. I dropped the plow and it flew out of the ground. I turned back again to trip the plow and I watched to see that it stayed in the ground, where it had to, when I started to turn back around, the locust branch were hung on the front of the tractor and exhaust pipe and it hit me in the face."

This is substantially all of the evidence of the accident. Plaintiff testified he was not familiar with the field but admitted he saw



the tree and that he would have seen the branches had his attention not been directed elsewhere. On trial he denied seeing or knowing of the existence of the branches. However, defendant introduced a part of a deposition of plaintiff, taken two years before, in which plaintiff testified of the existence of these low hanging branches and that he knew of the branches. Plaintiff also admitted he traveled some 20 feet facing the rear of the tractor before being struck.

At the outset it should be noted that the complaint charged the defendant with negligence in failing to provide reasonably safe and suitable tools for use by plaintiff in performing the work assigned to him. Obviously the defective clutch mechanism did not, in and of itself, cause plaintiff's injury. However, counsel for plaintiff contends that there is a causal connection between the defective clutch mechanism and the striking of plaintiff's eye by the overhanging tree limb. This contention ignores two salient facts which are undisputed, namely: (1) no difficulty was encountered in keeping the plow in the ground when the tractor was first stopped before engaging the clutch mechanism and (2) the presence of the low hanging tree limbs and any danger therefrom was obvious and apparent to the plaintiff as he commenced to plow along the fence line.

In Stone v. Guthrie, 14 Ill. App. 2d 137, 144 N.E. 2d 165, Wills v. Paul, 24 Ill. App. 2d 417, 164 N.E. 2d 631, and Kelly v. Fletcher-Merna Cooperative Grain Co., 29 Ill. App. 2d 419, 173 N.E. 2d 855, we outlined the law as applicable to master and servant cases involving farm accidents. We encounter no difficulty in applying those rules of law to the factual situation presented in the case at bar.

In the case at bar a safe method of engaging the plow in the ground was available to the plaintiff, which was known to him. The presence of the low hanging limbs was likewise known to plaintiff and he was therefore chargeable with knowledge of the danger inherent in driving the tractor into them without watching where he was proceeding. He voluntarily chose the hazardous method of doing the work required of him. Under these circumstances plaintiff cannot recover.

Accordingly the judgment of the Circuit Court of Logan County will be reversed.

REYNOLDS AND CARROLL, JJ., CONCUR.

